No. 031274 MAR 5 - 2004

In The
Supreme Court of the United States

JUANITA SWEDENBURG, in her own capacity, JUANITA SWEDENBURG, as proprietor of SWEDENBURG WINERY, a Virginia partnership; DAVID LUCAS, in his own capacity, DAVID LUCAS, as proprietor of THE LUCAS WINERY, a California sole proprietorship; PATRICK G. FITZGERALD, CORTES DeRUSSY, and ROBIN BROOKS,

Petitioners,

v.

EDWARD D. KELLY, Chairman of the State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in his official capacities; LAWRENCE J. GEDDA, Commissioner of the New York State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in his official capacities; JOSEPH ZARRIELLO, Commissioner of the New York State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in his official capacities; CHARMER INDUSTRIES, INC.; PREMIER BEVERAGE COMPANY LLC; PEERLESS IMPORTERS, INC.; LOCAL 2D OF THE ALLIED FOOD and COMMERCIAL WORKERS INTERNATIONAL UNION; EBER BROTHERS WINE AND LIQUOR CORP.; METROPOLITAN PACKAGE STORE ASSOCIATION, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does New York's discriminatory and protectionist prohibition against direct interstate shipment of wine to consumers violate the Commerce Clause of the U.S. Constitution; and if so, is it "saved" by the 21st Amendment?

2. Does New York's discriminatory and protectionist prohibition against direct interstate shipment of wine to consumers violate the Privileges and Immunities Clause of the U.S. Constitution?

PARTIES TO THE PROCEEDINGS

Petitioners, who were plaintiffs below, are Juanita Swedenburg, in her own capacity and as proprietor of Swedenburg Winery; David Lucas, in his own capacity and as proprietor of the Lucas Winery; Patrick G. Fitzgerald; Cortes DeRussy; and Robin Brooks.

Respondents who were defendants below are Edward F. Kelly, Chairman of the New York State Liquor Authority; and Lawrence J. Gedda and Joseph Zariello, Commissioners of the New York State Liquor Authority; sued in their official capacities.

Respondents who were defendant-intervenors below are Charmer Industries, Inc.; Premier Beverage Company LLC; Peerless Importers Inc.; Local 2d of the Allied Food and Commercial Workers International Union; Eber Brothers Wine and Liquor Corp.; and the Metropolitan Package Store Association, Inc.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

None of the petitioners is a corporation.

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OPINIONS BELOW

The decision of which review is sought is reported at *Swedenburg v. Kelly*, slip. op., Nos. 02-9511, 03-7089 (2d Cir. February 12, 2004) and republished in the Appendix at 1a. The decision of the district court granting petitioners' motion for summary judgment is reported at 232 F. Supp.2d 135 (S.D.N.Y. 2002) (App. 34a). The district court's remedy is unpublished (App. 72a).

JURISDICTION

The judgment of the Court of Appeals was entered on February 12, 2003. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case implicates the Commerce Clause, U.S. Const., art. I, §8, cl. 3 (App. 74a); the 21st Amendment (App. 74a); and the Privileges and Immunities Clause, U.S. Const., art. IV, §2 (App. 74a). Statutes involved include the Wilson Act, 27 U.S.C. §121 (App. 75a); the Webb-Kenyon Act, 27 U.S.C. §122 (App. 75a); the 21st Amendment Enforcement Act, 27 U.S.C. §122a (App. 76a); N.Y. Alco. Bev. Cont. Law §§102(1)(a), (c), and (d) (App. 80a); §§3(12-a), 76(4), 76(5), 76-a(6)(d), 99-b(1)(k), 105(9), and 130(1) (App. 86a-100a); and N.Y. C.L.S. Penal §10.00(4) (App. 101a).

STATEMENT

Petitioners are two small, family-run wineries in Virginia and California, respectively, and three New York consumers who would like to purchase their wines. For most alcoholic beverages, New York maintains a mandatory "three-tier" distribution system: producer to wholesaler to retailer to consumer. New York Alco. Bev. Cont. Law §102(1)(c) provides in relevant part that "No alcoholic beverages shall be shipped into the state unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages." Violation of the law is a criminal offense. N.Y. C.L.S. Penal §10.00(4) (App. 101a).

No license is available to out-of-state producers to traffic in alcoholic beverages, *House of York v. Ring*, 322 F. Supp. 530, 533 (S.D.N.Y. 1970); see also Jt. App. 699[1]; so that plaintiff wineries may distribute their products to New York consumers only if a licensed New York liquor wholesaler distributes their products. However, New York wineries enjoy the ability to sell and deliver wine directly to consumers through a number of provisions adopted over the years by the state legislature.[2] Most relevant to the instant case, N.Y. Alco. Bev. Cont. Law §§3(12-a) and

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[1] References to "Jt. App." are from the Joint Appendix submitted by the parties to the Court of Appeals.

[2] See, e.g., NY Alco. Bev. Cont. Law §76(4) (New York wineries can obtain retail licenses to sell "New York state labeled wines"); §76(2)(a) (New York wineries may conduct tastings of New York state labeled wines); §77(5) (New York wineries may sell New York state labeled wines on Sundays); §77(4)(b)(4) (New York wineries may sell the New York state labeled wines of other New York wineries); §76(5) (New York wineries may make deliveries on behalf of other New York wineries).

76-a(6)(d) (App. 80a and 94a) permit in-state farm wineries to distribute wine made from New York grapes directly to consumers through hired delivery mechanisms. Commercial wineries may obtain a retail license to sell New York wines under §76(4) (App. 88a), and then may deliver wine directly to consumers in vehicles owned or operated by a winery or hired through a registered trucking company pursuant to §105(9) (App. 98a). Those exemptions were enacted expressly to benefit New York wineries (Jt. App. 293, 299-301), see also (App. 54a-55a); and neither is available to out-of-state wineries.

The only way for an out-of-state winery to ship wine to New York consumers would be to establish a New York winery, which requires it to obtain a New York commercial winery license, maintain a staffed branch office and warehouse in New York, secure a retailer license, and then use its own or registered vehicles to deliver to "householders" only for use in their own premises under §77(2) (see Jt. App. 1564-1565). Thomas G. McKeon, general counsel for the New York State Liquor Authority, attests that no out-of-state winery has even attempted to navigate that system (Jt. App. 1564). Even were an out-of-state winery to have sufficient resources to open a New York winery, it would have none of the advantages available to farm wineries or the opportunities set forth in note 2, *supra*.

Before 1970, there were some opportunities for out-of-state wineries to ship directly to New York consumers, but the legislature closed those loopholes. "The law was enacted . . . to prevent what was considered to be an unfair and unwise form of competition with New York state licensees, and to eliminate unfair tax advantages. . . ." *House of York*, 322 F. Supp. at 533.

Plaintiffs filed this lawsuit in 1999, challenging §§102(1)(c) and (d) as applied to prohibit direct interstate wine shipments as a violation of the Commerce Clause and Privileges and Immunities Clause.[3] After considering an extensive record and the parties' cross-motions for summary judgment, the district court found the ban unconstitutional under the Commerce Clause. Applying *Bacchus Imports v. Diaz*, 468 U.S. 263 (1984), the court applied a two-part constitutional inquiry. First, the court concluded that under the Commerce Clause, the state's differential direct shipment rules, under which "out-of-state wineries must consign their products to a (three-tier) wholesaler, [while] in-state wineries do not" (App. 53a), triggered Commerce Clause scrutiny. "That the New York direct shipping ban on out-of-state wine burdens interstate commerce and is discriminatory (on its face) is clear from the very wording (let alone the impact) of the exemptions favoring in-state wineries" (App. 53a). Not only does the system "provide an impermissible economic benefit and (protection) to only in-state interests," there exist "nondiscriminatory alternatives available to serve the state's interests" (App. 54a). The court found the effort and expense for an out-of-state winery to obtain a New York commercial winery license and to maintain separate facilities in the state to be "unreasonable" (App. 55a). As a result, the court concluded that the "ban on the direct shipment to New York of out-of-state wine is *not* 'evenhanded' and

[3] Plaintiffs also challenged the advertising ban under §102(1)(a) as a violation of the First Amendment. Both the district court and court of appeals invalidated that provision.

constitutes a per se violation of the Commerce Clause." (App. 57a (emphasis in original)).

The court then turned to the state's 21st Amendment defense, and found that "[t]he State has not established that its legitimate goals" of temperance and tax revenue "cannot be accomplished in a nondiscriminatory manner" (App. 64a). Because the court reached its conclusion under the Commerce Clause, it did not reach the Privileges and Immunities claim (App. 66a-67a). The court enjoined defendants from prohibiting out-of-state wineries from shipping wine to consumers on the same terms and conditions as New York wineries (App. 72a-73a).

The Second Circuit reversed. Though the court acknowledged that the district court had "rel[ied] on the method of analysis utilized by a number of other federal courts in similar challenges" (App. 9a), it proceeded to apply a different analysis "that only one other circuit court has employed" (App. 13a). Specifically, the court declined to engage in a "two-tier" analysis in which the statute is assessed separately under the Commerce Clause and the 21st Amendment (App. 12a), but rather it considered "the scope of the Twenty-first Amendment's grant of authority to the states to determine whether the challenged statute is within the ambit of that authority, such that it is exempted from the effect of the dormant Commerce Clause" (App. 13a). The court found that "[a]ll wineries, whether in-state or out-of-state, are permitted to obtain a license as long as the winery establishes a physical presence in the state" (App. 25a). Although "fully recogniz[ing] that the physical presence requirement could create substantial dormant Commerce Clause problems if this licensing scheme regulated a commodity other than alcohol" (App. 26a), here the state's aim was to "ensure accountability" in

the context of alcohol (App. 27a), and therefore was within the state's 21st Amendment powers. Likewise, the scheme did not violate the Privileges and Immunities Clause because it "operates without regard to residency and does not provide New York residents with advantages unavailable to nonresidents" (App. 29a).

REASONS FOR GRANTING THE WRIT

The Court should grant the petition because the case satisfies the criteria set forth in S. Ct. R. 10(a) and (c). The decision below has contributed to a growing split of authority on an issue of great public importance. In doing so, it has decided the issue in a way that conflicts with relevant decisions of this Court. The only way to resolve the split and to reassert the authority of this Court's governing precedents is to grant the petition.

I. THIS CASE PRESENTS ISSUES OF NATIONAL IMPORTANCE TO PRODUCERS AND CONSUMERS, GOING TO THE HEART OF INTERESTS PROTECTED BY THE COMMERCE CLAUSE.

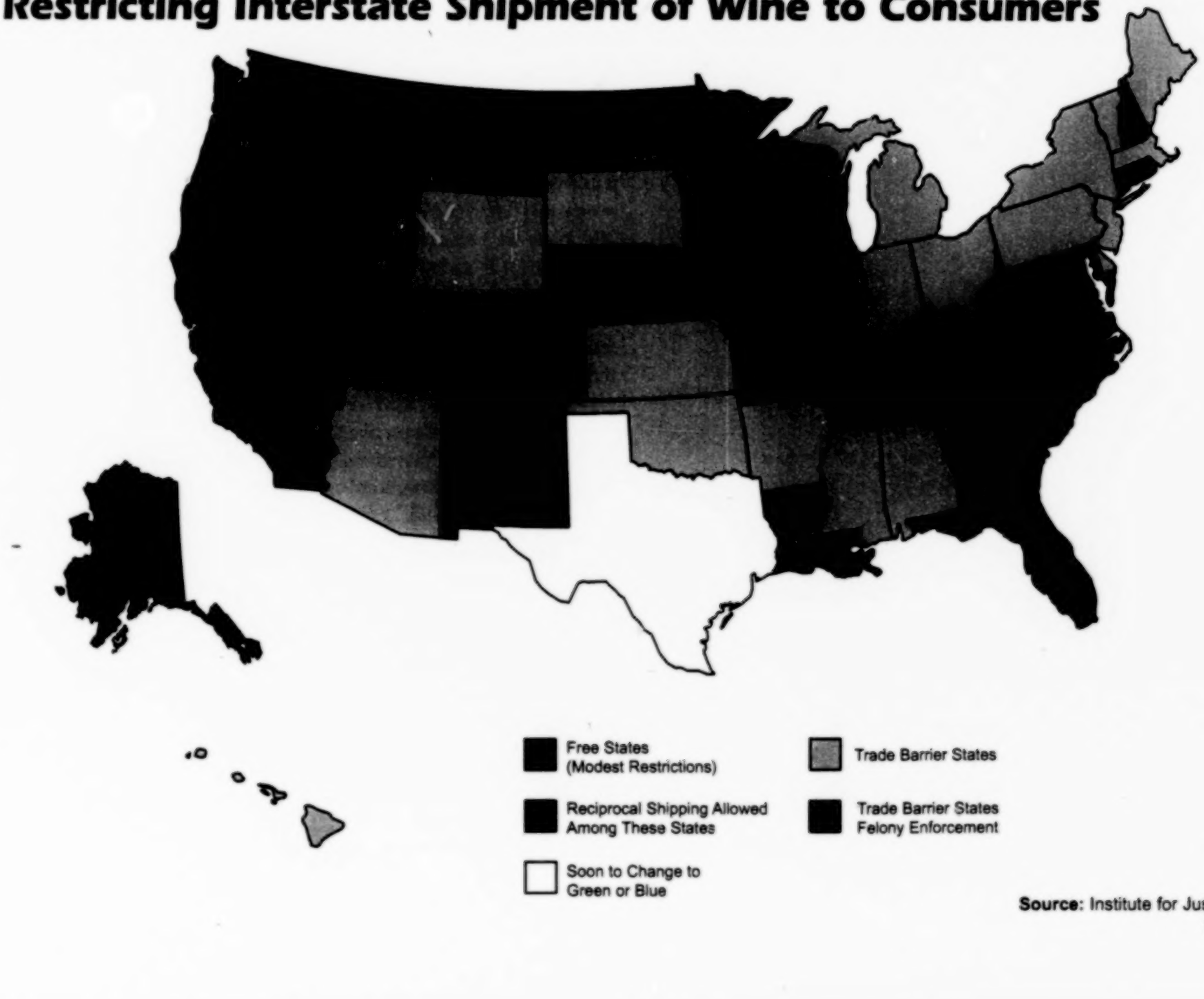
As this Court declared in *Gibbons v. Ogden*, 22 U.S. 1, 231 (1824), "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." The precious individual rights protected by the Commerce Clause, and by its sister protection of entrepreneurial freedom, the Privileges and Immunities Clause, are essential to our functioning as a nation. As the Court stated in *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 539 (1949),

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation. . . . Likewise, every consumer may look to the free competition from every producing area in the Nation. . . . Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

The petitioners in this case are two farmers and three consumers who humbly ask this Court to make good on that guarantee by removing a discriminatory and parochial trade barrier supported below and here by the state and a quartet of multi-billion dollar oligopolists.

The problem Mrs. Swedenburg and her fellow petitioners face is shared by producers and consumers across the United States. As the map on the next page illustrates, about half the states forbid the direct interstate shipment of wine to consumers, while the other half allow it (usually with a license requirement). Several of the states that prohibit direct interstate shipments, like New York, allow in-state wineries to ship directly to consumers. Even among the free-trade states, about a dozen are "reciprocity" states, allowing direct shipments only from states that themselves allow it. Some of the states that prohibit direct interstate shipments make it a felony. The resulting map depicts precisely the picture of "economic Balkanization" that the Commerce Clause was designed to prevent. *Hughes v. Okla.*, 441 U.S. 322, 325 (1979).

Restricting Interstate Shipment of Wine to Consumers



Source: Institute for Justice 2003:
www.ij.org

The effect of those trade barriers has been magnified by recent industry trends and technological innovations. The number of American wineries has increased exponentially to the point where there now are more than 2500 wineries in 49 states. In 1998, the top 25 wineries sold 82.7 percent of all wine, with the remaining wineries dividing the remainder. Most of the wineries outside the top 25 are family-run enterprises producing fewer than 5,000 cases annually (Jt. App. 184, 3535). At the same time, the wholesaler industry has contracted severely (Jt. App. 185-86, 279-86). The declining number of wholesalers can accommodate only a fraction of the growing number of wines produced each year (Jt. App. 190, 3534-35). For the vast majority of small wineries shut out of that process, direct shipping is the only viable option; and trade barriers like the challenged New York scheme effectively foreclose market access to thousands of wineries and wines (Jt. App. 201-02). See generally Shanker, "Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment," 85 *Va. L. Rev.* 353 (1999).

That restraint of trade occurs at a time when the Internet has made possible unlimited personalized economic transactions that would allow wineries to sell to consumers who wish to purchase their wine regardless of location (Jt. App. 675-78). A staff report by the Federal Trade Commission, based on extensive hearings, found that "State bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine." Federal Trade Comm'n, *Possible Anticompetitive Barriers to E-Commerce: Wine* (July 2003)[4]

[4] http://www.ftc.gov/os/2003/07/winereport2.pdf.

(hereafter FTC Report) at 3 and 14. The report found that such bans reduce consumer choice and increase prices. *Id.* at 3 and 16-25. It reported that the two dozen states that allow direct interstate shipments of wine successfully have fulfilled their legitimate regulatory objectives by constructing mechanisms to safeguard against underage access and, in some instances, to collect tax revenues. *Id.* at 4 and 26-39. But unless this Court reviews the decision below, the trade barriers that artificially constrict wine commerce in half the states will persist and the vast commercial promise of our technological era will be arrested.

II. THE CIRCUITS ARE PROFOUNDLY SPLIT IN MULTIPLE DIRECTIONS OVER THE APPROPRIATE ANALYTICAL FRAMEWORK FOR CASES AT THE INTERSECTION OF THE COMMERCE CLAUSE AND THE 21ST AMENDMENT.

A. The Circuit Split is Multifaceted, Growing, and Irreconcilable. In their petition for writ of *certiorari* in *Mich. Beer & Wine Wholesalers Ass'n v. Heald*, No. 03-1120 (filed February 4, 2004) at 6, the wholesaler petitioners aptly described the split in the circuits over the issues presented here as "import alcohol anarchy." The jurisprudential cacophony increased markedly with the decision below, which introduced a new, previously uncharted dimension to the conflicting decisions among the five circuit court decisions that preceded it.

As the chart on the next page illustrates, six circuit courts of appeals have confronted the precise question of whether states that maintain two different sets of rules for direct wine shipments – one for in-state wineries and a more onerous set for out-of-state wineries – have exceeded constitutional boundaries.

SPLIT IN AUTHORITY OVER DIRECT INTERSTATE SHIPMENT OF WINE						
Citation	*Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000)	*Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002)	*Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003)	*Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003)	*Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003)	*Swedenburg v. Kelly*, slip op. Nos. 02-9511, 03-7089 (2nd Cir. February 12, 2004)
Two sets of rules for in-state and out-of-state direct wine shipments?	Yes: State permits "local wineries, but not [out-of-state] wineries..to ship directly" (at 851).	Yes (at 1106-07)	Yes (at 515)	Yes (at 393)	Yes (at 521)	Yes (at 22-23)
Two sets of rules = facial discrimination?	No, because state "insists that every drop of liquor pass through its three-tiered system and be subjected to taxation" (at 853).	Yes (at 1109-11)	Yes (at 515)	Yes (at 397-400)	Yes (525)	No, because "wineries, whether in-state or out-of-state, are permitted to obtain a license as long as the winery establishes a physical presence in the state" (at 21).
Applicable precedent?	Various	*Bacchus* and *Milton S. Kronheim & Co. v. Dist. of Colum.*, 91 F.3d 193 (D.C. Cir. 1996) (at 1108)	*Bacchus* (at 513-15)	*Bacchus* is "the foundational case that established the modern jurisprudential framework for assessing state alcohol regulations under the Commerce Clause" (at 400).	*Bacchus* (at 524)	"We are hard-pressed to find any mandate from the Court directing us to utilize *Bacchus* as a template" (at 19 n.10).
Two-part Commerce Clause/21st Amendment scrutiny?	Unclear	Yes (at 1108)	Yes (at 514)	Yes (at 400)	Yes (at 524)	No (at 10)
Strict scrutiny under Commerce Clause?	Unclear	No: State's burden is "far less than..strict scrutiny" (at 1114, n.17)	Yes (at 515)	Yes (at 396)	Yes (at 524)	No
Least-restrictive alternative required?	No	No (at 1114, n.17)	Yes (at 515)	Yes (at 396)	Yes (at 524)	No
Result?	**Constitutional**	**Vacate decision dismissing claim and remand for analysis of state's defenses**	**Unconstitutional**	**Unconstitutional**	**Unconstitutional**	**Constitutional**
Remedy?			Alter state law to forbid direct in-state shipment of wine to consumers	Allow out-of-state wineries to ship on same terms as in-state wineries (at 407-10)		

Before the decision below, the clear weight of authority found that such discriminatory rules violated the Commerce Clause and were not "saved" by the 21st Amendment. We cannot improve upon the summary of the court below, and reproduce it at length:

> Four circuits have struck down the regulatory schemes in question, utilizing a two-step analytical framework, similar to that used by the district court here, in which the statute is first examined in the context of the dormant Commerce Clause. *Heald v. Engler*, 342 F.3d 517, 524 (6th Cir. 2003); *Dickerson v. Bailey*, 336 F.3d 388, 400 (5th Cir. 2003); *Beskind v. Easley*, 325 F.3d 506, 514 (4th Cir. 2003); *Bainbridge v. Turner*, 311 F.3d 1104, 1008 (11th Cir. 2002). Under traditional dormant Commerce Clause analysis, a state regulation is unconstitutional if it "affects interstate commerce in a manner either that (i) discriminates against interstate commerce, or (ii) imposes burdens on interstate commerce that are incommensurate with putative local gains." . . . In each of the four circuit court cases, the regulatory scheme at issue was found to be facially discriminatory in violation of the dormant Commerce Clause. *Heald*, 342 F.3d at 525; *Dickerson*, 336 F.3d at 402-03; *Beskind*, 325 F.3d at 515; *Bainbridge*, 311 F.3d at 1109-11. Notwithstanding a finding that the regulatory scheme violates the dormant Commerce Clause, the statute can be "saved" by the Twenty-first Amendment in the second step, but *only if* it advances one of the Amendment's "core concerns." Under this two-tier analysis, none of the state statutes regulating the importation of alcohol were saved by the Twenty-first Amendment core concern examination. *See Heald*, 342 F.3d at 526-27; *Dickerson*, 336 F.3d at

403-07; *Beskind*, 325 F.3d at 516-17; *Bainbridge*, 311 F.3d at 1111-15.

(App. 12a (some citations omitted) (emphasis in original).)

The court below flatly rejected that analysis, declaring that "[w]e think this two-step approach is flawed because the effect of unnecessarily limiting the authority delegated to the states through the clear and unambiguous language" of the 21st Amendment (App. 12a-13a). Instead, the Second Circuit joined the Seventh Circuit, see *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), *cert. denied*, 532 U.S. 1002 (2001), in an inquiry that "considers the scope of the Twenty-first Amendment's grant of authority to the states to determine whether the challenged statute is within the ambit of that authority, such that it is exempted from the effect of the dormant Commerce Clause" (App. 12a). The different mode of analysis employed by the two sets of courts dictates the outcome, as both the Second and Seventh Circuits upheld bans of interstate direct wine shipping, in contrast to the Fourth, Fifth, Sixth, and 11th Circuits.

Those contradictory decisions and modes of constitutional analysis present a stark enough conflict among the circuits. But even the courts that reached similar results in some instances employed different legal frameworks or remedies, as the chart illustrates. For instance, while the Fourth, Fifth, and Sixth Circuits applied strict scrutiny under the Commerce Clause, see *Beskind*, 325 F.3d at 515; *Dickerson*, 336 F.3d at 396; *Heald*, 342 F.3d at 524; the 11th Circuit applied a standard it described as "far less than . . . strict scrutiny." *Bainbridge*, 311 F.3d at 1115. Moreover, while the Fourth and Fifth Circuits agreed that discriminatory direct shipment rules are unconstitutional, they ordered diametrically opposite remedies, with the Fourth Circuit holding that the exemptions for in-state

wineries should be stricken, *Beskind*, 325 F.3d at 517-20; while the Fifth Circuit ordered that the opportunity to direct-ship should be extended to out-of-state wineries. *Dickerson*, 336 F.3d at 397-400.

At least two other appellate court decisions dealing with similar issues also used different legal tests and reached differing outcomes. In *Milton S. Kronheim & Co., Inc. v. Dist. of Colum.*, 91 F.3d 193 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997), the D.C. Circuit affirmed a law forbidding the storage of alcoholic beverages outside the District, adopting a "mixed motive" analysis otherwise unknown in Commerce Clause jurisprudence before or since.[5] Compare *Quality Brands, Inc. v. Barry*, 715 F. Supp. 1138 (D.D.C. 1989), *aff'd*, 901 F.2d 1130 (D.C. Cir. 1990) (applying traditional Commerce Clause analysis in alcohol context). By contrast, in *Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 63 P.3d 779 (Wash. 2003), the Washington Supreme Court struck down statutory distribution contract requirements from which in-state wineries were exempted, applying the same two-part analysis used by the Fourth, Fifth, Sixth, and 11th Circuits, while ordering the same extension of benefits remedy as the Fifth Circuit.

This discussion demonstrates that this is no simple or slight circuit split, if such a thing exists.[6] Rather, the split

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[5] The 11th Circuit crafted its legal standard by attempting to synthesize the holdings in *Bacchus* and *Kronheim*. *Bainbridge*, 311 F.3d at 1108.

[6] Indeed, the analysis of the court below conflicts not only with that of other courts, but of its own prior on-point precedent, which faithfully applied *Bacchus* and the traditional Commerce Clause 21st Amendment scrutiny it rejected below. See *Loretto Winery, Ltd. v.*

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is multidimensional and hopelessly irreconcilable, leading to wildly divergent results on identical issues. Moreover, the multiplicity of decisions in less than five years since the millennium indicates that these issues arise repeatedly, and indeed there are many more cases in the pipeline. Although a prevalent trend had been developing among the most recent decisions, the court below put an abrupt and jolting end to any prospect of jurisprudential harmony. The lower courts urgently need this Court's definitive guidance; and all of the wide range of interests affected – from producers and consumers of wine to state regulatory officials and even the middlemen seeking to protect their monopoly turf – need to know the applicable constitutional boundaries that apply to commerce in wine.

B. Any Effort to Harmonize the Cases Is Illusory. The court below made it clear that it was flatly rejecting the constitutional analysis applied by the Fourth, Fifth, Sixth, and 11th Circuits, pronouncing it "flawed" (App. 12a) and expressly adopting a different mode of analysis (App. 13a). Nonetheless, the court attempted to distinguish the contrary decisions by suggesting that "the statutes challenged in those cases were significantly different from the regulatory regime at issue here" (App. 13a, n.7).

Not so. The crux of the court's contention is that somehow the New York statute is nondiscriminatory, because supposedly "[a]ll wineries, whether in-state or out-of-state, are permitted to obtain a license as long as the winery establishes a physical presence in the state"

Gazzara, 601 F. Supp. 850 (S.D.N.Y.), *aff'd sub nom. Loretto Winery, Ltd. v. Duffy*, 761 F.2d 240 (2d Cir. 1985).

(App. 25a). The court contends that situation is "unlike in other states" (App. 8a). Although respondents have made such assertions about the unavailability of such mechanisms in other states, never have they backed them up with citations to statutes in the relevant states establishing residency requirements. To the contrary, the states at issue in *Heald* (Michigan),[7] *Dickerson* (Texas), and *Bainbridge* (Florida) do *not* appear to have residency requirements,[8] so that like in New York, at least theoretically an out-of-state winery could open an in-state winery and avail itself of some direct shipment options.[9]

But that is beside the point, because even to the limited extent that out-of-state wineries can gain access to direct shipping opportunities within New York, *the rules are still overwhelmingly skewed against them*. New York's scheme is replete with exemptions for in-state wineries,[10] which were adopted for avowedly protectionist motives

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[7] The court below cites *Heald*, 342 F.3d at 521, to the effect that "at present, there is no procedure whereby an out-of-state retailer or winery can obtain a license or approval to deliver wine directly to Michigan residents." The *Heald* court did not mean that Michigan imposes a residency requirement (it does not); but rather that an out-of-state winery cannot obtain a permit to ship directly to consumers in the state. That is exactly the situation here. *House of York*, 322 F. Supp. at 533 (no license exists for out-of-state wineries to ship into New York).

[8] Indeed, a residency requirement for alcohol licenses in Texas was struck down in *Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994).

[9] Even North Carolina (*Beskind*) authorizes the issuance of ABC permits to nonresidents so long as they have an agent in the state with power of attorney. N.C. Stats. §18B-900(2)(b).

[10] See note 2, *supra*, and accompanying text. Additionally, in 1995, the legislature overwhelmingly passed a law to permit direct interstate wine shipments. After a furious lobbying effort by liquor distributors, Governor Pataki vetoed the bill, citing concerns about the interests of in-state businesses and tax revenues (Jt. App. 477-536).

(App. 53a-54a).[11] The easiest and most common way for wineries to ship directly to consumers is by becoming a farm winery – a status that is *only available to New York wineries using New York grapes*. NY Alco. Bev. Cont. Law §§3(12-a) and 76-a(6)(d) (App. 86a and 94a). An out-of-state winery, by contrast, would have to open and staff a business office and a warehouse, and obtain winery, warehouse, and retail licenses in order to ship through authorized delivery methods to "householders" for consumption on the premises. §§3(37), 77(2) (see Jt. App. 1564-1565). That opportunity is at best theoretical, economically overwhelming for the small enterprises that comprise the vast majority of American wineries, and by no means substantially equivalent to the opportunities available to New York wineries. Little wonder then that "no out-of-state winery has applied for a license" under that system (Jt. App. 1564).[12]

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[11] Indeed, the court below disagreed with other circuits even on the critical threshold issue of whether exemptions for in-state wineries constitutes discrimination. Texas, for instance, also strenuously asserted that it did not discriminate against out-of-state wineries, a contention that the Fifth Circuit rejected. "To paraphrase the Bard, that which we call discrimination by any other name would still smell as foul. . . . The numerous ways in which in-state wineries are exempt" demonstrates that the system "is neither evenhanded nor incidental. . . ." *Dickerson*, 336 F.3d at 398.

[12] Respondents make much of the fact that one of petitioners' witnesses, John Dyson, ships wine from his California winery through his winery in New York. The point is that Dyson maintains functioning wineries in *both* states, and produces New York as well as California wines (thereby qualifying his New York winery as a farm winery), and therefore can avail himself of the full range of direct shipping opportunities available to New York wineries without incurring additional expense (Jt. App. 3600-3602). Contrast that situation with petitioner Swedenburg, who owns and operates a small winery. The cost of

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In the same breath that it contends the system is nondiscriminatory, the court below admits that the added costs and burdens applicable to out-of-state wineries (which it euphemistically refers to as the "physical presence requirement") "could create substantial dormant Commerce Clause problems if this licensing system regulated a commodity other than alcohol" (App. 26a). As the court points out, such Commerce Clause concerns arise only when there is discrimination, which triggers a virtual per se rule of invalidity. See, e.g., *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977). How then can the state's scheme constitute a per se violation of the Commerce Clause and *not* be discriminatory?

Regardless of how the court below characterizes it, and viewed even in the most charitable manner, New York plainly applies two sets of rules to direct shipping of wine to consumers, one applicable to in-state wineries and another, far more onerous set to out-of-state wineries. That, as the court below acknowledges, presents a classic Commerce Clause violation. The result reached below in contradiction to the weight of circuit authority is the product not of any meaningful dissimilarity between New York's regulatory scheme and those struck down in Michigan, Texas, and North Carolina, but rather of the court's misguided belief that the 21st Amendment provides a safe harbor for discriminatory, protectionist trade barriers.

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opening a staffed office and warehouse in New York would be prohibitive (Jt. App. 3564-3566). Multiply those burdens by 50 states and two thousand or so small wineries, and the Court can begin to fathom fully the devastating economic impact that the court's ruling below, if allowed to stand, would portend.

III. THE COURT BELOW REPUDIATED THIS COURT'S APPLICABLE FRAMEWORK AND HAS INTRODUCED A DANGEROUS NEW ELEMENT INTO COMMERCE CLAUSE JURISPRUDENCE.

In upholding a discriminatory trade barrier serving the ends of economic protectionism, the court expressly declined to apply the *only* recent precedent of this Court that balances the competing provisions of the Commerce Clause and the 21st Amendment in the absence of an affirmative exercise of congressional power to regulate commerce. "We are hard pressed to find any mandate from the Court directing us to utilize *Bacchus* as a template in analyzing the New York statute now before us" (App. 22a n.10).

Yet as the Fourth, Fifth, Sixth, and 11th Circuits – along with the Washington Supreme Court – have recognized, *Bacchus* provides precisely such a template when a court is faced with discriminatory trade barriers involving alcohol. Though the court below gives lip service to this Court's admonition that "'[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution'," and that it "considers each in light of the other, and in the context of the issues and interests at stake in any concrete case" (App. 13a, quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964), involving a prior New York alcohol trade barrier), the court went on to create a sweeping alcohol "exemption" (App. 13a) from the Commerce Clause that is utterly contrary to *Bacchus* and finds no support in caselaw. See, e.g., *Hostetter*, 377 U.S. at 331-32 (the notion that the 21st Amendment "has somehow operated to 'repeal' the Commerce Clause . . . [is] an absurd oversimplification").

In *Bacchus*, the Court confronted a Hawaii excise tax exemption for certain locally produced alcoholic beverages. The state raised the same defenses as respondents do here: that the statute advances legitimate state interests, it imposes no patent discrimination against interstate commerce, and the impact on interstate commerce is minimal. *Id.* 468 U.S. at 270. The Court agreed that the 21st Amendment provides broad state authority to regulate alcohol, but it declared that "one thing is certain: The central purpose of the [21st Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition." *Id.* at 276. The Court rejected the state's defenses, finding that "the legislation constitutes 'economic protectionism' in every sense of the phrase." *Id.* at 272. To the argument that the law was "saved" by the 21st Amendment, the Court responded that the amendment does not "empower States to favor local liquor industries by erecting barriers to competition. It is also beyond doubt that the Commerce Clause itself furthers strong federal interests in preventing economic Balkanization." *Id.* at 276.

The Court has reiterated that analytical framework in Commerce Clause cases involving alcohol where Congress has affirmatively spoken, demonstrating contrary to the opinion of the court below that the 21st Amendment does not carve out an exemption to the Commerce Clause. See, e.g., *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *Calif. Retail Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Even the case relied upon most heavily by respondents, which did not involve the Commerce Clause, did not undermine the holding in *Bacchus* that discriminatory trade barriers receive no shelter from the 21st Amendment. *N.D. v. U.S.*, 495 U.S. 423, 444

(1990) (Scalia, J., concurring in the judgment) ("All agree in this case that state taxes or regulations that discriminate . . . are invalid"); see also *id.* at 448 ("That is not to say, of course, that the State may enact regulations that discriminate").

By dispatching the Commerce Clause with such ease, the court below was able to avoid such niceties as the application of strict scrutiny or the virtual per se rule of invalidity; a genuine search for economic protectionism; or the shifting of the burden to the state to justify its policies, including the absence of less-discriminatory alternatives; all of which are time-tested, bedrock principles of Commerce Clause jurisprudence. See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997); *Hunt*, 432 U.S. at 353.

Instead, the Court below cursorily concluded that "we find no indication, based on the facts presented here, that the regulatory scheme is intended to favor local interests over out-of-state interests" (App. 25a). In so doing, the court completely ignored not only the strong inference of protectionism yielded by the presence of discrimination, see *Camps Newfound*, 520 U.S. at 581-82, but also the abundant evidence of economic protectionism in the record. Indeed, the district court in *House of York*, 322 F. Supp. at 533, found that a major purpose of the law was "to prevent what was considered to be an unfair and unwise form of competition with New York state licensees, and to eliminate unfair tax advantages"; and the district court below observed that "the Defendants explicitly concede the exceptions [for in-state wineries] were intended to be explicitly protectionist" (App. 54a-55a). Hence, the case in that respect is exactly like *Bacchus*, 468 U.S. at 271, in which the state likewise conceded that the

exceptions were for the benefit of in-state economic interests.

And unlike the Court in *Bacchus*, the court below accepted at face value the state's defense, namely that "physical presence" is essential to accountability (App. 25a-29a).[13] Nor did it require the state to justify the burdens "in terms of . . . the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt*, 432 U.S. at 353. Had it done so, it would have found, based on the uncontroverted evidence presented by petitioners, that the states that allow direct interstate shipping have created mechanisms to ensure accountability, such as permits, remission of taxation, and protections against underage access; and that those mechanisms are achieving their goals. See, e.g., FTC Report at 3 and 26-39. The court below reasons that "[r]equiring New York officials to traverse the country to ensure that direct sales to consumers (no matter how small) comply with New York law would render the regulatory scheme useless" (App. 28a). In reality, they don't have to: Congress recently adopted the 21st Amendment Enforcement Act, 27 U.S.C. §122a (App. 76a), which provides state attorneys general the authority to prosecute in their own federal courts violations of state alcohol laws against out-of-state producers.

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[13] Indeed, even the Seventh Circuit in *Bridenbaugh*, 227 F.3d at 851, to which the court below purports to adhere, dismissed the state's defense of maintaining "orderly market conditions" as "a euphemism for reducing competition and facilitating tax collection" – precisely the objectives identified for the law by the district court in *House of York*, 322 F. Supp. at 533.

Finally, by embracing a "physical presence" requirement that obligates an out-of-state winery to become a New York winery, which requires it to establish and staff a business office and warehouse in order to conduct business on terms remotely approaching those available to in-state wineries, the court below introduced a poisonous concept into Commerce Clause jurisprudence.[14] If a state could avoid a Commerce Clause violation by declaring, as did the court below, that there is no discrimination because everyone is required to have a business facility here, it would render the Commerce Clause a dead letter. An individual or company can always, theoretically, move to or establish operations in another state in order to avail themselves of trade opportunities available to residents; but the point of the Commerce Clause is they shouldn't have to.[15] As this Court has declared, the Commerce Clause forbids states from requiring out-of-state firms "to become a resident in order to compete on equal terms." *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64,

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[14] The court below suggests that this concept is confined to "this unique area of commerce" (App. 26a); but in fact it builds upon another recent decision of the same court upholding a requirement of a "bricks and mortar" presence in the state in the context of direct sales of cigarettes. *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2nd Cir. 2003).

[15] In contrast, petitioners have no objection whatsoever to having to obtain a license, submitting to jurisdiction (although that is unnecessary in light of the 21st Amendment Enforcement Act), paying taxes, or abiding reasonable regulations imposed by the host state. Indeed, that is precisely the system employed by the more than two dozen states that allow direct interstate shipping. See, e.g., La. R.S. 26:359(B)(1); Nev. Rev. Stat. Ann. §369.462; and N.H. RSA 178:14a(V).

72 (1963).[16] The physical presence requirement – oppressive as it is here, and palpably unnecessary in light of less-burdensome alternatives – makes a mockery of the protections of the Commerce Clause.

If indeed the 21st Amendment was not designed to repeal, but only to modify, the precious liberties protected by the Commerce Clause, it is essential that this Court grant the petition and overturn the decision below, which eviscerates those protections.

IV. THIS CASE IS ESPECIALLY APPROPRIATE FOR REVIEW OF THIS ISSUE BECAUSE IT ALSO PRESENTS A CLAIM UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE.

Most of the challenges to discriminatory barriers to interstate direct wine shipments (including the Michigan case pending on a petition for writ of *certiorari*) have been fought exclusively on the terrain of the Commerce Clause and the 21st Amendment. This case presents a second claim that stands on its own as a basis for overturning the ruling below, but which also should help to inform the Court's decision on the Commerce Clause issue: that the discriminatory trade barrier violates the Privileges and Immunities Clause.

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[16] The court's distinction between a "physical presence" and a "residency" requirement is a distinction without a difference. "Physical presence" in this context entails establishing an entirely separate business operation in New York, a fact that would render the facility a resident of New York.

Although the 21st Amendment limits somewhat the scope of the Commerce Clause, "it places no limits whatsoever on other constitutional provisions." *44 Liquormart v. Rhode Island*, 517 U.S. 484, 515 (1996); cf. *Craig v. Boren*, 429 U.S. 190 (1976) (21st Amendment does not limit application of the equal protection clause). Hence while this case and others like it require the courts to assess the appropriate lines of demarcation between the Commerce Clause and 21st Amendment, no such analytical line-drawing is necessary with respect to the Privileges and Immunities Clause because it retains its full vitality.

The Commerce Clause and Privileges and Immunities Clause are "mutually reinforcing." *Hicklin v. Orbeck*, 437 U.S. 518, 531 (1978). While the Commerce Clause protects free trade among the states, the Privileges and Immunities Clause protects the vital individual rights that are bound up in such trade. "[T]he pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause." *United Bldg. & Constr. Trades Council of Camden Cty. v. Mayor and Council of City of Camden*, 465 U.S. 208, 219 (1984).

As this Court recognized in *Toomer v. Witsell*, 334 U.S. 385, 396 (1948), "one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State."[17] That, of course, is precisely what

[17] Indeed, there does not even need to be an express provision identifying out-of-state citizenship as a basis for disparate treatment to proceed with a privileges and immunities claim. *Hillside Dairy Inc. v. Lyons*, 123 S. Ct. 2142, 2147 (2003). Here, the New York statutes are replete with overt preferences for New York wineries.

the state has deprived the winemaker plaintiffs of in this case.[18] Where such discrimination occurs, the judicial inquiry "must be concerned with whether [valid justifications] exist and whether the degree of discrimination bears a close relation to them." *Id.* Accord, *Supreme Ct. of N.H. v. Piper*, 470 U.S. 274 (1985). Although the district court applied precisely such an analysis (under the Commerce Clause), the court of appeals did not.

The Privileges and Immunities analysis dictated by *Toomer* happens to dovetail nicely with the Commerce Clause analysis applied in *Bacchus*. That makes sense: however much the 21st Amendment may have narrowed the scope of the Commerce Clause, surely it could not do so in a manner that would trigger a violation of another constitutional protection. In a sentence, it would be fair to say that the 21st Amendment modifies the Commerce Clause to the extent that it provides states with wide latitude to order their alcohol importation and distribution structures; but not so far as to eviscerate the right of out-of-state entrepreneurs to operate on substantially equivalent terms with in-state business interests. For the Court to decide this issue without reference to the Privileges and

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[18] The court below makes quick work of the Privileges and Immunities Clause, asserting that "the statutory scheme operates without regard to residency and does not provide New York residents with advantages unavailable to nonresidents" (App. 29a). That is quite different from finding, as this Court required in *Toomer*, 334 U.S. at 396, that the state must provide such opportunities "on terms of substantial equality." Given that the burdens placed on out-of-state wineries are so heavy that the court below conceded they ordinarily might constitute a per se violation of the Commerce Clause (App. 26a), it seems clear that this claim deserved a bit more contemplation than the cursory and dismissive analysis provided below.

Immunities Clause could lead to multiple cases and erroneous line-drawing, such as was performed by the court below.

Another reason to address this issue in the context of both clauses is that some justices have expressed the belief that negative Commerce Clause jurisprudence is misguided, and that much of the rights protected under that clause were in fact intended to be protected by other clauses. See *Camps Newfound*, 520 U.S. at 609-39 (Thomas, J., dissenting). This case would provide an ideal vehicle for the Court to decide this important issue with the benefit of all relevant constitutional claims having been raised. Such an inquiry would serve not only the interests of judicial economy but the ends of justice.

CONCLUSION

For all the foregoing reasons, petitioners respectfully ask this honorable Court to grant the petition.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2003

(Argued: September 3, 2003 Decided: February 12, 2004)

Docket Nos. 02-9511, 03-7089 Con

JUANITA SWEDENBURG, in her own capacity, JUANITA SWEDENBURG, as proprietor of Swedenburg Winery, a Virginia partnership, DAVID LUCAS, in his own capacity, DAVID LUCAS, as proprietor of The Lucas Winery, a California sole proprietorship, PATRICK G. FITZGERALD, CORTES DERUSSY, ROBIN BROOKS,

Plaintiffs-Appellees,

–v.–

EDWARD F. KELLY, Chairman of the State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in his official capacities, LAWRENCE J. GEDDA, Commissioner of the New York State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in his official capacities, JOSEPH ZARIELLO, Commissioner of the New York State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in his official capacities,

Defendants-Appellants,

CHARMER INDUSTRIES, INC., PREMIER BEVERAGE COMPANY LLC, PEERLESS IMPORTERS INC, LOCAL 2D OF THE ALLIED FOOD and COMMERCIAL WORKERS INTERNATIONAL UNION, EBER BROTHERS WINE AND LIQUOR CORP, METROPOLITAN PACKAGE STORE ASSOCIATION, INC.

Intervenor-Defendants-Appellants.

Before: NEWMAN, SOTOMAYOR, AND WESLEY, *Circuit Judges*.

Appeal from an order of the United States District Court of the Southern District of New York (Berman, J.), entered on December 12, 2002, in which the district court granted plaintiffs-appellees' motion for summary judgment and denied defendants-appellants' motion for summary judgment. The court also enjoined defendants-appellants from enforcing sections 102(1)(a), (c) and (d) of New York's Alcoholic Beverage Control Law in a manner inconsistent with its order. Defendants-appellants appealed.

AFFIRMED in part, REVERSED and REMANDED in part.

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WESLEY, *Circuit Judge*:

On December 6, 1933, the New York Times declared that "[p]rohibition of alcoholic beverages as a national policy ended at 5:32 ½ p.m. Eastern Standard Time" when Utah became the thirty-sixth state to ratify the Twenty-first Amendment. *Final Action at Capital,* N.Y. TIMES, Dec. 6, 1933, at 1. Utah had seen fit to delay its vote so that it might have the "honor" of ending the Prohibition era – Pennsylvania and Ohio had ratified the Amendment earlier that day. As the nation prepared to return to the legal use of alcohol, extra quotas of Canadian whiskies were made ready at the border while leaders of the Anti-Saloon League lamented that the sponsors of repeal would have to accept responsibility for the "evils of liquor." *Id.* at 2. The noble experiment, as President Hoover had called it, was at an end.

The Twenty-first Amendment is unequaled in our constitutional experience – it repeals one constitutional provision and creates an exception to another. The Amendment was not a narrow legislative delegation of federal authority; it was the will of a nation speaking through its constitutional process. The Amendment brought an end to Prohibition while reaffirming the states' power to control the delivery or use of alcohol within their borders. Section 2 of the Twenty-first Amendment prohibits "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or

use therein of intoxicating liquors, in violation of the laws thereof." U.S. Const. amend XXI, § 2. The language of this simple and straightforward amendment has not changed in the last seventy years. But the jurisprudence that gives the Amendment its life and effect has changed its sweep.

This case requires us to reconcile the competing demands of the Twenty-first Amendment's grant of authority to the states to regulate the intrastate traffic of alcohol, with the power reserved to Congress under the Commerce Clause "[t]o regulate Commerce . . . among the several States." U.S. Const. art. 1, § 8, cl. 3. Thus, we must determine whether New York's alcohol regulatory regime, insofar as it relates to the direct shipment of wine to New York consumers, is properly within the scope of section 2 of the Twenty-first Amendment, such that it is exempted from "the normal operation of the Commerce Clause," or more precisely, the dormant Commerce Clause. *Craig v. Boren,* 429 U.S. 190, 206 (1976). We conclude that the challenged regime is within the ambit of the Twenty-first Amendment and also does not violate the Privileges and Immunities Clause. We hold, however, that section 102(1)(a) of the State's regulatory regime violates the First Amendment insofar as it prohibits all commercial speech pertaining to the sale of alcoholic beverages directed to New York consumers by unlicensed entities.

BACKGROUND

A. New York's Regulatory Regime

Shortly following the ratification of the Twenty-first Amendment, New York, like most states, adopted a three-tiered system for the sale and distribution of alcoholic beverages. *See* N.Y. Alco. Bev. Cont. Law § 100(1) (McKinney

2000). One of the fundamental principles of the system is that all sales of alcohol within New York must be made to or by state-licensed entities. To this end, section 100(1) of New York's Alcoholic Beverage Control Law (the "ABC Law") provides that "[n]o person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter." *Id.* Section 102(1)(c) of the ABC Law also provides in relevant part that "[n]o alcoholic beverages shall be shipped into the state unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages."[1] *Id.* In addition, the ABC Law prohibits a common carrier or any other person from bringing or carrying any alcoholic beverages into the state "unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages." *Id.* § 102(1)(d).

Generally, the license application process is rigorous to ensure that only reputable individuals and their companies enter the alcoholic beverage trade. Applicants must identify any person with an interest in the business along with the sources of funds used in the licensed business. *Id.* § 110(1)(g). Licensees must also post an appropriate penal bond that may be subject to forfeiture for violation of the ABC Law or State Liquor Authority ("SLA") regulations. *Id.* § 112; N.Y. Comp. Codes R. & Regs. tit. 9, §§ 81.1-81.7 (2003). A conviction for a felony or certain misdemeanors

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[1] There are exceptions for alcoholic beverages purchased for personal use while outside the United States for at least forty-eight consecutive hours. *See* N.Y. Alco. Bev. Cont. Law § 102(1)(c) (McKinney 2000).

precludes a person from obtaining a license, N.Y. Alco. Bev. Cont. Law § 126(1) (McKinney 2000), and any person who commits a violation of the ABC Law cannot obtain a license for a period of two years. *Id.* § 126(5). Additionally, licensees must maintain adequate books and records on their premises and make them available for inspection by the SLA. *Id.* §§ 103(7), 104(10), 105(15), 106(12). These requirements facilitate the SLA's role in generating and collecting tax revenue, and in ensuring that licensees comply with the provisions of New York's regulatory scheme.

Section 76 of the ABC Law sets forth the requirements for obtaining a New York winery license. As defined under the ABC Law, a licensed winery is one that has paid the required licensing fee, *id.* § 76, and "has and maintains a branch factory, office or storeroom within the state of New York and receives wine in this state consigned to a United States government bonded winery, warehouse or storeroom located within the state." *Id.* § 3(37).[2] Licensed wineries enjoy important privileges in New York's regulatory scheme. For example, a licensed winery may sell and ship its wine to another licensed winery, a wholesaler or a retailer. *Id.* § 77(1). More importantly, however, a licensed winery may also obtain a retail license, allowing it to sell

[2] Smaller New York wineries can obtain a farm winery license at a lower fee. N.Y. Alco. Bev. Cont. Law § 76-a (McKinney 2000). A licensed farm winery can manufacture no more than 150,000 finished gallons of wine annually, *id.* § 76-a(7), and must use New York-grown grapes or other fruits in the manufacturing process. *Id.* § 76-a(5). Like other licensed wineries, a licensed farm winery may sell and ship its wine to a licensed winery, wholesaler or retailer, or directly to consumers. *Id.* §§ 76-a(3), (6)(d).

and ship its wines directly to consumers. *Id.* §§ 76(4), 77(2). Thus, unlike in other states,[3] out-of-state wineries are permitted to seek and obtain a New York license to distribute and sell alcohol. They must, however, comply with the licensing requirements of the ABC Law, including establishing and maintaining a physical presence in New York.

B. Decision Below

Plaintiffs-appellees, Juanita Swedenburg and David Lucas, proprietors of two out-of-state wineries, and Patrick Fitzgerald, Cortes DeRussy and Robin Brooks, New York wine consumers, filed this action against New York State seeking a declaration that sections 102(1)(a), (c) and (d) of New York's ABC Law are facially unconstitutional under the Commerce Clause, the Privileges and Immunities Clause, and the First Amendment. Plaintiffs-appellees claim sections 102(1)(c) and (d) violate the dormant Commerce Clause because they prevent the winery plaintiffs-appellees from shipping their wine products directly to New York consumers. The wineries contend that based on their size – Swedenburg estimates New York sales of only 120 to 180 bottles of wine a year – direct sales to consumers through a website or the mail are their only possible access to the New York market. Thus, plaintiffs-appellees

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[3] *See* Fla. Stat. ch. 561.221 (2003); N.C. Gen. Stat. § 18B-102.1 (2003); Tex. Alco. Bev. Code Ann. § 107.07 (2003); *see also Heald v. Engler*, 342 F.3d 517, 521 (6th Cir. 2003) ("[R]eading a number of provisions in conjunction with each other . . . at present, there is no procedure [in Michigan] whereby an out-of-state retailer or winery can obtain a license or approval to deliver wine directly to Michigan residents.") (internal quotation marks omitted).

argue the licensing scheme provides an unconstitutional advantage to in-state wineries and is not "saved" by the Twenty-first Amendment. They also contend that section 102(1)(a) impermissibly bans out-of-state purveyors from soliciting orders from New York consumers, thereby violating the First Amendment.

State defendants and intervening defendants, wholesale distributors of alcohol, (collectively, "defendants-appellants"), argue that the regulatory scheme operates even-handedly with respect to in-state and out-of-state interests, and thus does not improperly discriminate against out-of-state wineries. Defendants-appellants further argue that, in any event, the regulatory scheme is excepted from dormant Commerce Clause scrutiny, as it is a proper exercise of the State's authority under the Twenty-first Amendment to regulate the importation and distribution of alcohol for delivery or use within its borders.

Defendants-appellants moved to dismiss the complaint, pursuant to Federal Rule of Civil Procedure 12(b)(6), but the district court denied the motion. After discovery, the parties cross-moved for summary judgment. The district court granted plaintiffs-appellees' motion. *See Swedenburg v. Kelly,* 232 F. Supp. 2d 135 (S.D.N.Y. 2002). Relying on the method of analysis utilized by a number of other federal courts in similar challenges, the district court first found that the New York regime directly discriminated against interstate commerce. *Id.* at 145. The court then held that the ban on direct shipment of out-of-state wine by non-licensed wineries did not "implicate the

State's core concerns under the Twenty-first Amendment," and thus, the ban was not insulated from a dormant Commerce Clause attack. *Id.* at 148.[4]

The court rejected the State's contention that the "presence" requirement of the statute cured its alleged discriminatory effect. "It appears unreasonable to this Court to require that an out-of-state winemaker 'become a resident in order to compete on equal terms.'" *Id.* at 146 (quoting *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64, 72 (1963)). The district court noted that the Supreme Court has viewed with substantial suspicion state statutes requiring that business operations be performed in the regulating state that could more efficiently be performed elsewhere. *Id.* With regard to the First Amendment claim, the court held that "[h]aving concluded that New York's ban on direct shipment of wine into the state is unconstitutional, Section 102(1)(a) may similarly, going forward, be read to prohibit lawful solicitations on behalf of out-of-state wineries – and needs to be revised." *Id.* at 152.

After further submissions and oral argument by the parties, the court entered judgment enjoining State defendants-appellants from enforcing section 102(1)(c) and (d) in a manner that "would prohibit (i) the winery plaintiffs from shipping their wine to New York consumers on the same terms and conditions applicable to New York wineries and (ii) the consumer plaintiffs from receiving

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[4] In light of its decision on the Commerce Clause claim, the court found it unnecessary to reach appellees' Privileges and Immunities Clause claim. *Id.* at 152.

wines shipped directly to them from out-of-state wineries on the same terms and conditions applicable to consumers of New York wineries."[5] *Swedenburg v. Kelly*, No. 00-0778 (S.D.N.Y. Dec. 12, 2002). The court further enjoined State defendants-appellants from enforcing section 102(a) "against the winery plaintiffs in a manner that would prevent them from conveying lawful information to New York consumers on the same terms and conditions applicable to New York wineries." *Id.*

State defendants and intervenor-defendants appealed.

DISCUSSION

I. CONSTITUTIONALITY OF THE REGULATORY SCHEME UNDER THE TWENTY-FIRST AMENDMENT

A. Analytical Framework

We do not approach this case with a blank slate. Five other circuits have decided similar cases; a common thread runs throughout.[6] Each challenged a state regulatory scheme that prohibited out-of-state wineries from importing and selling wine directly to consumers, but permitted local wineries to avoid the three-tier distribution system

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[5] State-defendants argued the appropriate remedy was to strike the provisions that allow licensed wineries to sell directly to consumers. *Cf. Beskind v. Easley*, 325 F.3d 506, 517-20 (4th Cir. 2003).

[6] *See Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003); *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003); *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003); *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000); *see also Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 149 Wash. 2d 98 (2003) (considering the constitutionality of a statutory exemption for in-state wineries).

with direct sales to consumers. Four circuits have struck down the regulatory schemes in question, utilizing a two-step analytical framework, similar to that used by the district court here, in which the statute is first examined in the context of the dormant Commerce Clause. *Heald v. Engler,* 342 F.3d 517, 524 (6th Cir. 2003); *Dickerson v. Bailey,* 336 F.3d 388, 400 (5th Cir. 2003); *Beskind v. Easley,* 325 F.3d 506, 514 (4th Cir. 2003); *Bainbridge v. Turner,* 311 F.3d 1104, 1108 (11th Cir. 2002). Under traditional dormant Commerce Clause analysis, a state regulation is unconstitutional if it "affects interstate commerce in a manner either that (i) discriminates against interstate commerce, or (ii) imposes burdens on interstate commerce that are incommensurate with putative local gains." *Brown & Williamson Tobacco Corp. v. Pataki,* 320 F.3d 200, 208 (2d Cir. 2003) (internal quotation marks and citations omitted); *see also Freedom Holdings, Inc. v. Spitzer,* No. 02-7492, slip op. 7299, 7316-26 (2d Cir. Jan. 6, 2004). In each of the four circuit court cases, the regulatory scheme at issue was found to be facially discriminatory in violation of the dormant Commerce Clause. *Heald,* 342 F.3d at 525; *Dickerson,* 336 F.3d at 402-03; *Beskind,* 325 F.3d at 515; *Bainbridge,* 311 F.3d at 1109-11. Notwithstanding a finding that the regulatory scheme violates the dormant Commerce Clause, the statute can be "saved" by the Twenty-first Amendment in the second step, but *only if* it advances one of the Amendment's "core concerns." Under this two-tier analysis, none of the state statutes regulating the importation of alcohol were saved by the Twenty-first Amendment core concern examination. *See Heald,* 342 F.3d at 526-27; *Dickerson,* 336 F.3d at 403-07; *Beskind,* 325 F.3d at 516-17; *Bainbridge,* 311 F.3d at 1111-15. We think this two-step approach is flawed because it has the effect of unnecessarily limiting the authority

delegated to the states through the clear and unambiguous language of section 2.[7]

A second mode of analysis recognizes that "[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution," and considers each "in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964). In this vein, the second mode of inquiry considers the scope of the Twenty-first Amendment's grant of authority to the states to determine whether the challenged statute is within the ambit of that authority, such that it is exempted from the effect of the dormant Commerce Clause. *See Craig*, 429 U.S. at 206. We adopt this approach acknowledging that only one other circuit court has employed it in a similar case. *See Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000) (upholding an Indiana statute restricting the direct shipment of wine on the ground that it was a permissible expression of the state's authority under section 2 of the Twenty-first Amendment). The inquiry, in our view, should not allow the protective doctrine of the dormant Commerce Clause to subordinate the plain language of the Twenty-first Amendment. Instead, the inquiry should be sensitive to the manner in which these two constitutional forces

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[7] Although we disagree with the analytical paradigm employed, we need not assess the other circuits' determinations, as the statutes challenged in those cases were significantly different from the regulatory regime at issue here. We note, however, that the Fourth Circuit offered a possible nondiscriminatory alternative to North Carolina's statute that is remarkably similar to the New York scheme. *See Beskind*, 325 F.3d at 516.

interact in light of the impact the Twenty-first Amendment has on dormant Commerce Clause concerns.

B. The Legal History of the Twenty-first Amendment

While the language of section 2 is clear, it is helpful to understand the jurisprudential and statutory context of its birth. Prior to the Eighteenth Amendment and nationwide prohibition of alcohol, many states attempted to ban the production and consumption of alcohol, but found their efforts thwarted by Supreme Court decisions invoking the doctrine now known as the dormant Commerce Clause. *See, e.g., Bowman v. Chicago & N.W. Ry. Co.*, 125 U.S. 465, 481, 493-94 (1888) (invalidating under the dormant Commerce Clause a state law restricting the importation of liquor to those possessing a permit); *Leisy v. Hardin*, 135 U.S. 100 (1890) (holding that, even after importation, liquor contained in its original package remained an article of interstate commerce, subject to federal Commerce Clause authority). As a result of the Court's decisions, "dry" states found themselves in the unenviable position of being able to prohibit consumption of domestic liquor but helpless to stop the importation of liquor from outside their borders. *See Bridenbaugh*, 227 F.3d at 852 (recounting pre-Prohibition jurisprudence).

Congress reacted by enacting the Wilson Act, ch. 728, 26 Stat. 313 (1890), which gave states the authority to regulate imported liquor "*to the same extent and in the same manner* as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." *Id.* (emphasis added). The Wilson Act's language signaled Congress' intent to allow

states to regulate imported alcohol in the same manner as domestically produced alcohol.

The Supreme Court, however, narrowly construed the Wilson Act, permitting states to regulate the resale of imported liquor in its original package, but preventing the regulation of direct shipments to in-state consumers by out-of-state distributors. *Rhodes v. Iowa,* 170 U.S. 412, 423-25 (1898). Congress responded with the Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913), which prohibited "the shipment or transportation, in any manner or by any means whatsoever, of any . . . liquor of any kind, from one State . . . into any other State which . . . is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State. . . ." *Id.* The Act's broad language ensured that dry states had the authority to prevent the importation of alcohol across their borders. By the time the Supreme Court upheld the Webb-Kenyon Act in *Clark Distilling Co. v. Western Maryland Railway Co.,* 242 U.S. 311 (1917), the temperance movement had gained considerable ground throughout the nation. And in 1919, the Eighteenth Amendment set the nation on a course of national prohibition and ended the states' legal struggle to regulate alcohol.

The ratification of the Twenty-first Amendment did not return the Constitution to its pre-1919 form. Most states wished to control alcohol use within their borders. Accordingly, the language of section 2 of the Twenty-first Amendment, "closely follow[ed] the [language of] the Webb-Kenyon and Wilson Acts," *Craig,* 429 U.S. at 205-06, thereby prohibiting "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in

violation of the laws thereof." U.S. Const. amend. XXI, § 2. Section 2 effectively constitutionalizes most state prohibitions regulating importation, transportation, and distribution of alcoholic beverages from the stream of interstate commerce into the state.

Because section 2 speaks directly to the importation of liquor into the state, dormant Commerce Clause jurisprudence could no longer be employed to insulate interstate shipments of liquor from state regulation, as almost "[*e*]*very* use of § 2 could be called 'discriminatory' in the sense that . . . every statute limiting [interstate] importation leaves intrastate commerce unaffected." *Bridenbaugh*, 227 F.3d at 853 (emphasis in original). Allowing dormant Commerce Clause concerns to restrict state regulatory schemes that focus on the importation of liquor would render section 2 a nullity.

C. Analysis

Section 2 of the Twenty-first Amendment grants "the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). This constitutional grant of authority should not, we think, be subordinated to the dormant Commerce Clause inquiry when the two provisions conflict, as they do here. Plaintiffs-appellees argue that the scope of section 2's grant of authority to the states has been narrowed by a series of Supreme Court decisions. The end result, they posit, is that a state law regulating the importation of interstate liquor is a proper exercise of the state's section 2 power only if it regulates in a non-discriminatory manner

and is intended to advance the "core concerns" of the Twenty-first Amendment – namely temperance, the promotion of orderly market conditions, and revenue production. *See North Dakota v. United States,* 495 U.S. 423, 432 (1990) (plurality opinion).

We disagree with the proposition that the Supreme Court's Twenty-first Amendment jurisprudence confines the scope of section 2 to state regulations that advance so-called core concerns. In our view, although the Supreme Court's Twenty-first Amendment jurisprudence has to some degree cabined the scope of section 2, it has done so only insofar as it has limited section 2's grant of authority to its plain language. That is, the Supreme Court has consistently recognized only that, under section 2, a state may regulate the importation of alcohol for distribution and use within its borders, but may not intrude upon federal authority to regulate *beyond* the state's borders or to preserve fundamental rights.[8]

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[8] *See, e.g., 44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996) (holding that the Twenty-first Amendment does not grant the states authority to regulate in violation of the First Amendment); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.,* 476 U.S. 573 (1986) (holding that the Twenty-first Amendment does not confer upon the states authority to regulate alcohol prices in other states); *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263 (1984) (holding that the Twenty-first Amendment does not provide states with the authority to regulate to the detriment of the federal interest in maintaining a national marketplace); *Craig v. Boren,* 429 U.S. 190 (1976) (holding that the Twenty-first Amendment does not grant the states authority to regulate in violation of the Equal Protection Clause); *Dep't of Revenue v. James B. Beam Distilling Co.,* 377 U.S. 341 (1964) (holding that the Twenty-first Amendment does not grant the states power to intrude upon the federal interest in regulating foreign alcohol imports); *Hostetter v. Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324 (1964) (holding that the Twenty-first

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1. *Early Twenty-first Amendment Jurisprudence*

In the years immediately following the Twenty-first Amendment's ratification, the Supreme Court recognized the Amendment's extensive delegation of authority to the states. In *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936), a unanimous Court upheld a California statute that imposed a licensing fee for the privilege of importing beer into the state against a dormant Commerce Clause challenge raised by a group of out-of-state beer importers. In so doing, the Court acknowledged that, "[p]rior to the Twenty-First Amendment it would . . . have been unconstitutional" to impose the challenged licensing fee. *Id.* at 62. The Twenty-first Amendment, however, "confer[red] upon the state the power to forbid all importations which do not comply with the conditions which it prescribes." *Id.*

Two years later, the Court, again unanimously, upheld a Minnesota statute that clearly discriminated against imported liquors by imposing an alcohol-content requirement not imposed on domestically-produced liquors. *See Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938). The Court noted that "under the amendment, discrimination against imported liquor is permissible although it is not an incident of reasonable regulation of the liquor traffic." *Id.* at 403; *see also Ziffrin v. Reeves*, 308 U.S. 132 (1939).

These early cases established that section 2 provided the states with the authority to enact legislation for the regulation of alcohol traffic within its borders, even where

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Amendment does not grant states the authority to intrude upon the federal interest in regulating foreign commerce).

those regulations operated to the disadvantage of out-of-state interests. Although some courts – including our sister circuits – appear to have distanced themselves from these early cases,[9] they have never been overruled.

2. *Contemporary Twenty-first Amendment Jurisprudence*

We acknowledge that more recent cases have recognized that the Twenty-first Amendment is not a plenary grant of authority to states to regulate all activity involving alcohol. As the Supreme Court has noted, "[o]nce passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful." *Craig*, 429 U.S. at 206 (considering the impact of the Twenty-first Amendment on an Equal Protection challenge to a state law prescribing different drinking ages for males and females); *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (considering the impact of the Twenty-first Amendment in the context of a First Amendment challenge to a state statute prohibiting advertisement of liquor prices). Section 2's grant of authority to the state to regulate alcohol within its borders could not sustain state statutes that violated individual liberties protected by other constitutional provisions.

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[9] *See, e.g., Heald*, 342 F.3d at 522 (finding Michigan's reliance on these cases "disingenuous at best"); *Dickerson*, 336 F.3d at 406 (relying on more recent Twenty-first Amendment jurisprudence in determining the constitutionality of Texas' regulatory regime); *Cooper v. McBeath*, 11 F.3d 547, 555 (5th Cir. 1994) (noting that more recent Twenty-first Amendment jurisprudence has confirmed that section 2 does not grant the states plenary authority to regulate alcohol).

Similarly, in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), the Court struck down New York's attempt to prohibit the sale of liquor to internationally-bound travelers at a duty-free airport shop operating under the supervision of the United States Bureau of Customs. *Id.* at 329. In so holding, the Court rejected the view that "the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned." *Id.* at 331-32. Such a view, the Court declared, would effectively strip Congress of its "regulatory power over interstate or foreign commerce in intoxicating liquor." *Id.* at 332. The *Idlewild* Court distinguished the earlier Twenty-first Amendment cases, such as *Young's Market, Mahoney,* and *Ziffrin,* on the ground that, in those cases, liquor was being imported and distributed *into* the state's territory, and thus, the challenged statutes permissibly regulated the *intrastate* traffic of alcohol. *Id.* at 330-31. In contrast, the alcoholic beverages that New York sought to regulate in *Idlewild* were held on federal property and were intended for overseas sale. In light of these considerations, the Court determined that New York's authority, under the Twenty-first Amendment, to regulate the flow of alcohol within its borders was not implicated by the facts in *Idlewild. Id.* at 333.

In *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964), the Court invalidated a state law seeking to impose a tax on alcohol imported from Scotland on the ground that it violated the Constitution's Export-Import Clause. *Id.* at 346. The Court reiterated it had "no doubt" that Kentucky could regulate alcohol "destined for distribution, use, or consumption within its borders." *Id.* Section 2, however, did not give the state the power to

impose a tax "clearly of a kind prohibited by the Export-Import Clause." *Id.* at 343. In both *Idlewild* and *James B. Beam Distilling,* the point of differentiation from the *Young's Market* line of cases was the fact that in the earlier cases, the state's regulatory efforts were confined to the interstate importation and intrastate distribution of alcohol, and therefore did not impermissibly intrude on regulatory powers reserved to the federal government.

Two decades after *Idlewild* and *James B. Beam Distilling,* the Court reemphasized the view that the Twenty-first Amendment is not without limits when a state regulatory scheme conflicts with valid federal concerns. In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980), the Court, upon finding that a California wine-pricing program violated the Sherman Act, considered whether section 2 "permit[ted] California to countermand the congressional policy – adopted under the commerce power – in favor of competition." *Id.* at 106. Ultimately, the Court concluded that because federal antitrust concerns animating the Sherman Act outweighed California's desire to protect small liquor retailers from predatory pricing schemes of larger retailers, section 2 could not salvage the offending statute. *Id.* at 114. Four years later, in *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691 (1984), the Court echoed *Midcal*'s refrain, holding unconstitutional an Oklahoma statute that required in-state television operators to delete advertisements for alcoholic beverages contained in the out-of-state signals that they retransmitted by cable to Oklahoma subscribers. In striking down the law, the Court reiterated that the Twenty-first Amendment had not repealed the Commerce Clause, and declared that when a state statute does not directly regulate the sale or use of

liquor within the state's borders, a conflicting exercise of federal authority may prevail. *Id.* at 713.

The Supreme Court has also viewed with caution state attempts to invoke section 2 as a pretext for economic protectionism. In *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263 (1984), Hawaii imposed an excise tax on liquor sales at wholesale, while exempting certain locally produced alcoholic beverages. The Court invalidated the Hawaiian tax on the grounds that it was intended to "favor local liquor industries," and therefore was preempted by "strong federal interests in preventing economic Balkanization" and promoting a unified national market.[10] *Id.* at 276. In *Brown-Forman Distillers Corp. v. New York State Liquor Authority,* 476 U.S. 573 (1986), the Court

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[10] Regrettably, *Bacchus* is offered as requiring the two-step analysis employed by four of the circuits. *See Heald,* 342 F.3d at 523-24; *Dickerson,* 336 F.3d at 400; *Beskind,* 325 F.3d at 514; *Bainbridge,* 311 F.3d at 1108. We are hard pressed to find any mandate from the Court directing us to utilize *Bacchus* as a template in analyzing the New York statute now before us. *Bacchus* initially analyzed the Hawaiian tax scheme in terms of the dormant Commerce Clause because Hawaii defended the tax as having no effect on interstate commerce. Hawaii did so by arguing that the volume of sales of the two local beverages was exceptionally small. Thus, the state argued its attempt to help some, but not all, local beverages did not hurt sales of other beverages produced in Hawaii or elsewhere. *See Bacchus,* 468 U.S. at 268-69. After rejecting that argument, the Court then went on to address an argument Hawaii advanced for the first time at the Court – one based on section 2 of the Twenty-first Amendment. The Court rejected Hawaii's belated effort to save the tax. It noted that the purpose of the tax was to stimulate a local industry, not to regulate the use and distribution of alcohol. *See id.* at 274-76. We find nothing in the Supreme Court's opinion that dealt with Hawaii's arguments in seriatim that requires us to transpose the resolution of one case into an analytical model for all.

struck down a New York statute that required state-licensed distillers to comply with a price schedule that established prices for local liquor sales no higher than the lowest price the distiller charged in other states. The Court recognized that the statute could, in effect, control the prices of alcoholic beverages in neighboring states. *Id.* at 582-84. Thus, the Court concluded that the statute was an impermissible extraterritorial attempt to regulate liquor prices. *Id.* at 585; *see also Healy v. Beer Inst.*, 491 U.S. 324, 342 (1989) (affirming *Brown-Forman*'s holding that "the Twenty-first Amendment does not immunize state laws from invalidation under the Commerce Clause when those laws have the practical effect of regulating liquor sales in other States").

In each of these cases, the Supreme Court was called upon to resolve competing claims of constitutional authority. In each, the Court "limited" the scope of section 2 only insofar as it related to a state's attempt to regulate the traffic of alcohol outside of its borders or in violation of other powers reserved to the federal government. However, in each case, the Court unequivocally reaffirmed the principle that insofar as section 2 permits each state to regulate alcohol traffic within its borders it "primarily created an exception to the normal operation of the Commerce Clause." *Craig*, 429 U.S. at 206.[11] The Supreme

[11] *Accord, Healy*, 491 U.S. at 342 (noting that section 2 authorizes state regulation of intrastate liquor traffic, and thus does not permit state laws that attempt to prescribe prices for out-of-state liquor sales); *Brown-Forman*, 476 U.S. at 585 ("Section 2 of the Twenty-first Amendment . . . speaks only to state regulation of the transportation or importation into any State . . . for delivery or use therein of alcoholic beverages.") (internal quotation marks omitted); *Bacchus*, 468 U.S. at

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Court has neither held nor implied that laws prescribing regulations for the importation and distribution of alcohol within a state's borders "are problematic under the dormant commerce clause." *Bridenbaugh*, 227 F.3d at 853. Indeed, as the language of the Amendment and the Court's jurisprudence amply demonstrate, section 2's powers are directed specifically towards intrastate regulation and traffic of liquor.

This limited interpretation of section 2 is consistent with the political and cultural forces animating Prohibition and its subsequent repeal by the Twenty-first Amendment. That is, the impact of the dormant Commerce Clause has always been an issue relating to state efforts to regulate the flow of liquor within its borders. Following a series of federal statutory efforts to provide states with the legal wherewithal to regulate intrastate alcohol traffic, the Eighteenth Amendment prohibited the flow of alcohol on a national level. With Prohibition's repeal, the drafters of the Twenty-first Amendment crafted section 2 to allow states the authority to circumvent

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282 (noting "we have consistently reaffirmed that understanding of the Amendment, repeatedly acknowledging the broad nature of state authority to regulate commerce in intoxicating liquors"); *Midcal*, 445 U.S. at 110 (acknowledging that "[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system" within the state); *Capital Cities Cable, Inc.*, 467 U.S. at 713 (noting that "the core § 2 power" concerns the regulation of alcohol within the state's borders); *James B. Beam Distilling Co.*, 377 U.S. at 344 ("[B]y virtue of [section 2 of the Twenty-first Amendment] a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.") (internal quotation marks omitted); *Idlewild*, 377 U.S. at 330 (same).

dormant Commerce Clause protections, provided that they were regulating the intrastate flow of alcohol.

3. *New York's Regulatory Regime*

New York's regulatory regime falls squarely within the ambit of section 2's grant of authority. The statutory scheme regulates only the importation and distribution of alcohol in New York. New York's prohibition of the sale and shipment of wine by unlicensed wineries directly to New York consumers serves valid regulatory interests. The statute allows the state to monitor the distribution and sale of alcoholic beverages by permitting such distribution and sale only through state-licensed entities supervised by, and accountable to, the SLA.

Although we are sensitive to the Supreme Court's instruction that "[s]tate laws that constitute mere economic protectionism are . . . not entitled to the same deference as law enacted to combat the perceived evils of an unrestricted traffic in liquor," *Bacchus,* 468 U.S. at 276, we find no indication, based on the facts presented here, that the regulatory scheme is intended to favor local interests over out-of-state interests. All wineries, whether in-state or out-of-state, are permitted to obtain a license as long as the winery establishes a physical presence in the state. Wine that is delivered to a branch office or warehouse can then be shipped directly to consumers.

Presence ensures accountability. Records of sales and compliance with New York's regulatory requirements must be available for inspection by SLA officials. Violations are subject to disciplinary measures carried out in New York, including fines imposed against the bond all license

holders are required to post. New York treats wine importers the same as it treats internal sellers; all must either utilize the three-tier system or obtain a physical presence from which the state can monitor and control the flow of alcohol.

We fully recognize that the physical presence requirement could create substantial dormant Commerce Clause problems if this licensing scheme regulated a commodity other than alcohol. When a state statute, whether on its face or in effect, discriminates against interstate commerce, it is virtually per se invalid unless the State can justify the discrimination "both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt v. Washington State Apple Adver. Comm'n,* 432 U.S. 333, 353 (1977).

Here, the requirement that all wine be shipped through a New York warehouse is a precondition to direct consumer sales. We recognize that "state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere . . . ha[ve] been declared to be virtually per se illegal." *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 145 (1970); *see also C & A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383 (1994); *South-Cent. Timber Dev. v. Wunnicke,* 467 U.S. 82 (1984). But business efficiency must give way to valid regulatory concerns in this unique area of commerce. Under this scheme, out-of-state wineries will incur some costs in establishing and maintaining a physical presence in New York, costs not incurred by in-state wineries. These effects, however, do not alter the legitimacy of section 2's delegation of authority. While it may be an additional expense for out-of-state wineries to be present in New

York, they gain access to a market not available to others – direct sales to consumers. The fact that some out-of-state wineries will have greater costs than others (out-of-state or in-state) in accessing the market is not determinative.[12] New York has chosen to relax its regulatory grip for wineries to sell directly to consumers. It has not barred out-of-state wineries from the opportunity; it has correlated its relaxation of regulatory scrutiny with a safety net ensuring accountability – presence. *See Milton S. Kronheim & Co. v.. District of Columbia,* 91 F.3d 193, 204 (D.C. Cir. 1996).

New York's desire to ensure accountability through presence is aimed at the regulatory interests directly tied to the importation and transportation of alcohol for use in New York. *See North Dakota,* 495 U.S. at 432 (plurality opinion) ("In the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate."). All wine will pass through a warehouse located in New York, allowing state officials access to the product. As noted above, every licensee must

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[12] Appellees did present some evidence of a general nature with regard to projected costs that an out-of-state winery would incur in obtaining a New York license. They argue those projected costs justify their decision not to pursue a New York license. We find those projections to be of little use, and they are certainly not determinative. Appellees do not contend the requirements for licensing are somehow arbitrary or unrelated to the state's desire to regulate the industry. They simply argue the costs are too high to warrant entry into the market.

maintain books and records on premises available for inspection at any time by the SLA.

In 2000, there were over 2,100 wineries in the country, a 275% increase since 1975. Requiring New York officials to traverse the country to ensure that direct sales to consumers (no matter how small) comply with New York law would render the regulatory scheme useless.[13] Section 2 does not require that New York bear the burden in attempting to ensure proper compliance with its tax and regulatory system regarding imported wine. New York's "motives of legitimate state interests which would be promoted by requiring [physical presence], *e.g.*, auditing company records, monitoring compliance with the ABC laws, monitoring licenses, checking tax forms for audits, etc., fall [] . . . squarely within the state's core enforcement powers over alcohol." *Kronheim*, 91 F.3d at 203-04 (internal quotation marks and citation omitted).

The winery plaintiffs presented compelling proof that boutique wineries with limited production of high quality wine have a niche in an increasingly sophisticated national market of wine connoisseurs. Facility of travel and the Internet have made wineries all over the nation available to those wishing to visit and buy wine – personally or in a virtual sense. Indeed, a majority in both houses of New York's legislature felt that New York wineries (the vast majority of which are quite small) would benefit from a reciprocity statute that would allow direct sales to

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[13] The recently enacted Twenty-first Amendment Enforcement Act, while helpful to states, can only be used after a violation occurs. *See generally* 27 U.S.C. § 122a. Under section 2, states have the authority to be proactive as well as reactive.

consumers by unlicensed out-of-state wineries from states allowing New York wineries the same opportunity. *See* S. 3533-A, A-7411, 1995 Senate-Assembly Bill (NY 1995). The governor chose to veto the bill. *See* Governor's Veto #76 (NY 1995). Changes in marketing techniques or national consumer demand for a product do not alter the meaning of a constitutional amendment. If New York wishes to further relax its regulatory control of the flow of wine into New York, it can do so.

We hold that the challenged regulatory scheme is within the ambit of the powers granted to states by the Twenty-first Amendment. New York's regulatory scheme allows licensed wineries, whether in-state or out-of-state, direct access to a market of sophisticated oenophiles. The scheme does so in a non-discriminatory manner, while targeting valid state interests in controlling the importation and transportation of alcohol. Accordingly, we conclude that New York has acted within its authority under the Twenty-first Amendment.

II. Constitutionality of the Regulatory Scheme Under the Privileges and Immunities Clause

Plaintiffs-appellees also argue New York's statutory scheme violates the Privileges and Immunities Clause, which provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. For purposes of this clause, "the terms 'citizen' and 'resident' are used interchangeably." *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274, 279 n.6 (1985). As we have discussed above, the statutory scheme operates without regard to residency and does not provide New York residents with advantages unavailable to nonresidents. *Cf. Supreme*

Court of Virginia v. Friedman, 487 U.S. 59, 70 (1988) (invalidating a Virginia Supreme Court rule permitting Virginia residents entrance to the state bar without an examination). Accordingly, we find that the regulatory scheme does not violate the Privileges and Immunities Clause.[14]

III. Constitutionality of Section 102(1)(a) Under the First Amendment

Finally, plaintiffs-appellees challenge the constitutionality of section 102(1)(a), which provides:

> No person shall send or cause to be sent into the state any . . . publication of any kind containing *an advertisement or a solicitation of any order for any alcoholic beverages*, irrespective of whether the purchase is made or to be made within or without the state, or whether intended for commercial or personal use or otherwise, *unless such person shall be duly licensed.*

N.Y. Alco. Bev. Cont. Law § 102(1)(a) (McKinney 2000) (emphasis added). In the district court, plaintiffs-appellees argued that section 102(1)(a) was unconstitutionally overbroad in violation of the First Amendment. The district court agreed, but only after deciding that sections 102(c) and (d) were unconstitutional. *See Swedenburg*, 232 F. Supp. 2d at 152. On appeal, plaintiffs-appellees maintain that this section is unconstitutionally overbroad,

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[14] Appellees who are New York citizens do not have standing to challenge the regulatory regime under the Privileges and Immunities Clause. *See Zobel v. Williams*, 457 U.S. 55, 59 n.5 (1982).

independent of the constitutional status of sections 102(c) and (d). We agree with plaintiffs-appellees that the statute is overbroad and violates the First Amendment.

It is well established that states may prohibit commercial speech concerning unlawful activity. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563-64 (1980). If, however, commercial speech concerns lawful activity and is not misleading, courts must then look to whether there is a substantial governmental interest in prohibiting the commercial speech at issue. *Id.* at 566. If the government has identified a substantial interest in regulating the speech, courts "must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.* The state "carries the burden of showing that the challenged regulation advances [its] interest in a direct and material way." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (internal quotation marks and citation omitted).

New York contends that the SLA interprets section 102(1)(a) narrowly to prohibit only unlawful activity – "the unlawful solicitation of orders for direct shipments of alcohol to New York residents by unlicensed producers or sellers." In so doing, the State argues, SLA's interpretation prohibits only the advertising of unlawful activity, and thus does not run afoul of the First Amendment.

An agency's interpretation of a statute it is charged to administer deserves broad deference when the interpretation has been adopted in a rule-making or other formal proceeding. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Here, however, the State relies only on an affidavit submitted in this litigation as an expression of

the agency's view. This Court has held that an opinion letter or a position taken in the course of litigation is entitled to deference only to the extent that it is persuasive. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001). Here, we find the State's affidavit unpersuasive.

Section 102(1)(a) plainly encompasses a broader prohibition than the solicitation of orders by unlicensed, out-of-state wineries for direct shipment of wine to New York consumers. The statute's broad language prohibits unlicensed persons from causing *any* publication to enter the state that contains an "advertisement or a solicitation of any order for any alcoholic beverages." N.Y. Alco. Bev. Cont. Law § 102(1)(a) (McKinney 2000). While the state can limit illegal sales of alcohol, section 102(1)(a) broadly encompasses protected speech. For example, if plaintiffs-appellees' wineries advertised on the Internet and included an order form that is lawful in their own states, the advertisement would be illegal in New York, even if it contained language limiting sales to states in which such orders were lawful. Under the broad terms of section 102(1)(a), the limitation would be insufficient, as the statute prohibits *any* advertising activity by unlicensed wineries.

The State's efforts to defend section 102(1)(a) on the ground that it is narrowly interpreted are unavailing.[15] "[T]he Twenty-first Amendment does not qualify the

[15] New York has not argued that it has a substantial interest in limiting advertising of wines in general, or that the prohibition advances any potential interest such as temperance.

constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment." *44 Liquormart*, 517 U.S. at 516. Accordingly, we hold that, in impermissibly regulating protected commercial speech, section 102(1)(a) is overbroad and impermissibly violates the First Amendment.

CONCLUSION

The district court's order of December 12, 2002, is hereby AFFIRMED in part and REVERSED in part and the matter remanded for further proceedings in accordance with this opinion.

JUANITA SWEDENBURG, in her own capacity and as Proprietor of SWEDENBURG WINERY, a Virginia Partnership; DAVID LUCAS, in his own capacity and as Proprietor of THE LUCAS WINERY, a California sole Proprietorship; PATRICK FITZGERALD; CORTES DeRUSSY; and ROBIN BROOKS, Plaintiff, -against- EDWARD F. KELLY, Chairman, and LAWRENCE J. GEDDA and JOSEPH ZARRIELLO, Commissioners, of the State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in their official capacities, Defendants, -and- CHARMER INDUSTRIES, INC., PEERLESS IMPORTERS INC., EBER BROTHERS WINE & LIQUOR CORP., PREMIER BEVERAGE COMPANY LLC, METROPOLITAN PACKAGE STORE ASSOCIATION, INC., LOCAL 2D OF THE ALLIED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, and DR. CALVIN BUTTS, Intervenor-Defendants.

00 Civ. 0778 (RMB)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

232 F. Supp. 2d 135; 2002 U.S. Dist. LEXIS 21841

November 12, 2002, Decided
November 12, 2002, Filed

COUNSEL: For Juanita Swedenburg, David Lucas, Patrick Fitzgerald, Cortes Derussy, Robin Brooks, PLAINTIFFS: Deborah Simpson, Institute for Justice, Washington, DC USA.

For Juanita Swedenburg, David Lucas, Patrick Fitzgerald, Cortes Derussy, Robin Brooks, PLAINTIFFS: Lance J Gotko, Friedman, Kaplan & Seiler LLP, New York, NY USA.

For Edward F Kelly, Lawrence J Gedda, Joseph Zarriello, DEFENDANTS: August L Fietkau, Eliot Spitzer, Attorney General of NYS, New York, NY USA.

JUDGES: RICHARD M. BERMAN, U.S.D.J.

OPINION BY: RICHARD M. BERMAN

OPINION:

DECISION AND ORDER

I. Introduction

This case is one of a series of recent constitutional challenges to state alcoholic beverage control laws, particularly as they relate to the direct shipment of wine. What the cases all have in common is the relationship (and tension) between the Commerce Clause of the United States Constitution, which empowers Congress to regulate commerce among the several states, and the Twenty-first Amendment to the Constitution, which grants to the states the power to regulate the importation and distribution of alcoholic beverages within their borders. **The Court concludes that the New York ban on the direct shipment of out-of-state wine is unconstitutional.**

On February 3, 2000, Plaintiffs Juanita Swedenburg ("Swedenburg") and David Lucas ("Lucas"), proprietors of two out-of-state wineries, and Patrick Fitzgerald ("Fitzgerald"), Cortes DeRussy ("DeRussy"), and Robin Brooks ("Brooks"), three New York State consumers of wine (collectively "Plaintiffs") filed an action against Defendants Edward F. Kelly ("Kelly"), Chairman of the New York State Liquor Authority, and Lawrence J. Gedda ("Gedda") and Joseph Zarriello ("Zarriello"), Commissioners of the New York State Liquor Authority,

requesting that the Court "declare . . . N.Y. Alco. and Bev. Cont. Law §§ 102(1)(a), (c), and (d) ["ABC Law"] . . . unconstitutional, void, and of no effect[.]"[1] Compl. at 10. Plaintiffs claim that "the Direct Shipment and Advertising Ban violates the rights of all the plaintiffs to freedom of commerce as guaranteed by the interstate commerce clause," *id.* ¶ 38, "the economic liberty of the plaintiffs Swedenburg and Lucas under the privileges and immunities guarantee," *id.* ¶ 46, and, "the right of the winery plaintiffs to produce, and of the consumer plaintiffs to receive, protected speech in violation of the First Amendment." *Id.* ¶ 54.

Defendants Kelly, Gedda, and Zarriello, as well as Intervenors Charmer Industries, Inc., Peerless Importers Inc., Eber Brothers Wine & Liquor Corp., Premier Beverage Company LLC, Metropolitan Package Store Association, Inc., Local 2d of The Allied Food and Commercial Workers International Union, and Dr. Calvin O. Butts (collectively "Defendants") filed a (joint) motion to dismiss the complaint on or about May 11, 2000, pursuant to

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[1] ABC Law § 102(1)(a) states that, "No person shall send or cause to be sent into the state any letter, postcard, circular, newspaper, pamphlet, order kit, order form, invitation to order, price list, or publication of any kind containing an advertisement or a solicitation of any order for any alcoholic beverages . . . unless such person shall be duly licensed hereunder to traffic in alcoholic beverages." Section 102(1)(c) provides that, "No alcoholic beverages shall be shipped into the state unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages . . . " Section 102(1)(d) provides that, "No common carrier or other person shall bring or carry into the state any alcoholic beverages, unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages. . . . " Section 130(3) makes violation of the N.Y. ABC Law a misdemeanor.

Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 12(b)(6). Plaintiffs, including amici Coalition to Preserve Consumer Access to Wine, Arcadian Estate Vineyards and Cascata Winery at the Professor's Inn, and Consumer Alert, opposed Defendants' motion.[2] Oral argument was held on July 21, 2000. By Decision and Order dated September 5, 2000 ("September 5, 2000 Decision"), the Court denied Defendants' motion to dismiss. **"No evidence has been presented here regarding the purpose(s) and effect(s) of New York's ABC Laws and it would be precipitous to make a determination foreclosing Plaintiffs' cause upon the existing record. At this stage, the Court is constrained to assume that a 'principal purpose of the Direct Shipment and Advertising Ban is economic protectionism [.]'"** *Swedenburg v. Kelly,* 2000 U.S. Dist. LEXIS 12758, 00 Civ. 778(RMB), 2000 WL 1264285, at *10 (S.D.N.Y. Sept. 5, 2000) (citing Compl. ¶ 36) (emphasis in original).

Discovery ensued, and on June 7, 2001, Plaintiffs moved for summary judgment pursuant to Fed. R. Civ. P. 56(c).[3] "The law is discriminatory on its face and burdens interstate commerce by making it all but impossible for many small wineries to sell their products to New York consumers." Plaintiffs' Memorandum of Law in Support of

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[2] On June 5, 2000, the Court also granted a letter application by the Coalition for Free Trade to participate as amicus.

[3] The evidence submitted by Plaintiffs generally has focused on the economic impact of the direct shipping ban, the ability of small out-of-state wineries to access the New York market, the economics of the current wine market and the legislative history of the New York ABC Laws. Defendants' evidence has tended to focus upon the utility of the three-tier system and its impact upon temperance and teen drinking.

Motion for Summary Judgment ("Pl. Mem.") at 2.[4] Defendants cross-moved for summary judgment on August 17, 2001, asserting that "state regulations . . . that prohibit shipments from out-of-state wineries to anyone other than in-state licensed wholesalers 'fall within the core of the State's power under [Section 2 of] the Twenty-first Amendment' and are 'unquestionably legitimate'."[5] Defendants' Memorandum of Law in Support of Motion for Summary Judgment ("Def. Mem.") at 2-3. Plaintiffs and Defendants filed reply briefs dated October 13, 2001 and November 13, 2001, respectively. *See* Pl. Reply; Def. Reply. Oral argument – which was enormously helpful to the Court – was held on April 17, 2002. Supplemental briefs

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[4] "[T]he federal Constitution empowers Congress 'to regulate Commerce . . . among the several states.' U.S. Const. Art. 1, § 8, cl. 3. The courts have interpreted the language of this provision affirmatively granting authority to Congress to regulate commerce as having a 'negative' aspect, designated the 'dormant' commerce clause, that implicitly establishes a national free market and restricts state and local governments from impeding the free flow of goods from one state to another." *Dickerson v. Bailey*, 87 F. Supp.2d 691, 693 n.2 (S.D. Tex. 2000) (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 469-70, 117 L. Ed. 2d 1, 112 S. Ct. 789 (1992)); *see also Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. 850, 856 (S.D.N.Y. 1985), *aff'd sub nom., Loretto v. Duffy*, 761 F.2d 140 (1985) ("[t]he traditional principles underlying the [commerce] clause operate not only as a grant to Congress of power to regulate interstate commerce, but also as a restriction on the authority of the states to regulate interstate trade.")

[5] Section 2 of the Twenty-first Amendment of the U.S. Constitution states that: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2.

were, thereafter, filed at the Court's request on April 19, 2002.[6]

II. Background[7]

Like other states, New York has a "three-tier" system of alcohol sales. Alcohol producers must go through licensed wholesalers and distributors who must, in turn, go through licensed retailers who then sell to consumers. *See* Vijay Shanker, Note, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment,* 85 Va. L. Rev. 353, 355 (1999). All alcoholic beverages (not just wine) must be distributed through this three-tiered system. The ABC Law does not allow out-of-state wineries to ship their products directly to New York consumers. *See* N.Y. ABC Law § 102(1)(c).[8]

Plaintiffs, who are here concerned only about the distribution of wine, contend, *inter alia*, that the direct shipment ban violates both the Commerce Clause and the

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[6] By letter dated November 4, 2002, Defendants' counsel advised the Court that on November 2, 2002, President Bush signed into law the "Direct Shipping Statute" which allows customers of an out-of-state winery, under certain circumstances, to ship wine directly to the customers' home state. As noted by Plaintiff's counsel in his letter dated November 8, 2002, this new law does not affect the outcome of this case except, perhaps, to bolster the conclusion that direct shipment of wine is a viable alternative to its ban.

[7] A somewhat more detailed recitation of the facts, incorporated herein by reference, is presented in the Court's September 5, 2000 Decision. *See Swedenburg v. Kelly,* 2000 U.S. Dist. LEXIS 12758, 00 Civ. 778, 2000 WL 1264285 (S.D.N.Y. Sept. 5, 2000).

[8] Plaintiffs note that "prior to 1970, New York maintained a three-tier system for alcohol distribution, but the system permitted some direct shipments of wine," i.e. for personal use. Pl. Mem. at 16.

Privileges and Immunities Clause of the United States Constitution.[9] "New York's ABC Law on its face regulates interstate commerce and creates discriminatory burdens." Pl. Mem. at 12. Plaintiffs argue that Defendants' explanations of New York's direct shipping ban do not "justify the economic protectionism of [the law]." Pl. Reply at 7. Plaintiffs also contend that New York law "forbids certain advertising of lawful products and thereby deprives all plaintiffs of the free flow of communications guaranteed by the First Amendment." *Id.* at 3.

Defendants, as noted, rely principally upon the explicit language of the Twenty-first Amendment and assert "the State has acted within its 'core powers' . . . to regulate the 'transportation or importation' of alcoholic beverages for 'delivery or use' within the State." Def. Mem. at 6. They contend that "where, as here, a state regulation concerns 'whether to permit importation or sale of liquor and how to structure the liquor distribution system,' which is the 'central power reserved by § 2 of the Twenty-first Amendment,' that ends the inquiry." *Id.* at 7 (quoting *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 715, 81 L. Ed. 2d 580, 104 S. Ct. 2694 (1984)).[10] Defendants further

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[9] The Privileges and Immunities Clause of Article IV, § 2 provides that "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2.

[10] Defendants also contend that "there can be no violation of the 'dormant' Commerce Clause here because Congress recently passed the Twenty-first Amendment Enforcement Act ("Act") [106 Pub. L. 386] to support state bans on direct shipping." Def. Mem. at 12. The Court finds this argument unpersuasive because the Act merely authorizes a state attorney general to enforce state law "regulating the importation or transportation of any intoxicating liquor" in federal court, 27 U.S.C.

(Continued on following page)

contend that the New York Alcoholic Beverage Control "regime" advances and is premised upon legitimate state interests protected by the Twenty-first Amendment, including promoting temperance, ensuring orderly market conditions, and raising revenue. *Id.*[11] With respect to communications, Defendants assert that the ABC Laws includes a "narrowly tailored restriction on commercial advertising for alcoholic beverages . . . plainly aimed at preventing the unlawful solicitation of orders for direct shipments of alcohol to New York residents by unlicensed suppliers." Def. Mem. at 29 (emphasis in original). In his November 4th letter, Defendants' counsel argues (incorrectly in the Court's view) that: "Congress has spoken on the direct shipment of wine, has struck the balance it deems appropriate, and has therefore removed the issue of state direct shipping bans from application of the 'dormant' Commerce Clause."

III. Standard of Review

Summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show . . . that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548

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§ 122a(b), and explicitly provides that it "shall not be construed to grant to States any additional power." 27 U.S.C. § 122a(e)(2).

[11] In fact, Defendants argue that New York's ABC Law does not violate the "dormant" Commerce Clause and that there is no need for the Court to assess whether the law is "saved" by the Twenty-first Amendment. Def. Mem. at 13-22.

(1986); *Gallo v. Prudential Residential Servs., Ltd.*, 22 F.3d 1219, 1223 (2d Cir. 1994).

The moving party bears the initial burden of "informing the district court of the basis for its motion" and identifying the matter that "it believes demonstrate[s] the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. The burden then shifts to the nonmoving party which "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) (quoting Fed. R. Civ. P. 56(e)); *accord Brass v. American Film Technologies, Inc.*, 987 F.2d 142 (2d Cir. 1993). The substantive law governing the case will identify those facts which are material and "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); *see also Gallo*, 22 F.3d at 1223.

When cross-motions for summary judgment are made the standard is the same as that for individual motions for summary judgment. *See Morales v. Quintel Entertainment, Inc.*, 249 F.3d 115, 121 (2d Cir. 2001). Each motion must be considered independently of the other and, when evaluating

each, the court must consider the facts in the light most favorable to the non-moving party. *See id.*[12]

IV. Recent (Related) Litigation

At the time of the Court's September 5, 2000 Decision, three other district courts had considered constitutional challenges to state alcoholic beverage regulations as they relate to the direct shipment of wine and ruled, *inter alia,* that the challenged statutes were in violation of the dormant Commerce Clause. *See Swedenburg,* 2000 U.S. Dist. LEXIS 12758, 2000 WL 1264285, [WL] at *3-4 (discussing *Bridenbaugh v. O'Bannon,* 78 F. Supp. 2d 828 (N.D. Ind. 1999) (Indiana statute prohibiting direct shipment of wine from out-of-state to an Indiana residence held unconstitutional on motion for summary judgment); *Dickerson v. Bailey,* 87 F. Supp. 2d 691 (S.D. Tex. 2000) (finding upon summary judgment that ban on direct shipment from out-of-state wineries violates the dormant commerce clause); and *Kendall-Jackson Winery, Ltd. v. Branson,* 82 F. Supp. 2d 844 (N.D. Ill. 2000) (preliminary injunction granted where plaintiffs showed likelihood of

[12] Following oral argument, the Court asked the parties to submit additional letters addressing the question of whether an evidentiary hearing was required to resolve the instant motions. On May 16, 2002, Plaintiffs wrote that, "all evidence is before the Court," and that "any evidentiary hearing would be redundant of the extensive evidence presently before the Court." By letter dated May 21, 2002, Defendants argued that "this Court need not hold any evidentiary hearing to decide this case in defendants' favor" but that a hearing would be required on the issue of "whether the State's state temperance objective is pretextual[.]"

success on the merits that the Illinois winery "exemption" violates dormant commerce clause)).[13]

Eight days after the Court issued its September 5, 2002 Decision, the United States Court of Appeals for the Seventh Circuit reversed the Indiana district court's decision in *Bridenbaugh* and found the direct shipping ban to be constitutional. *See Bridenbaugh v. Freeman-Wilson,* 227 F.3d 848, 854 (7th Cir. 2000) (Easterbrook, J.)[14] In *Bridenbaugh,* plaintiffs had challenged Title 7.1 of the Indiana Code which establishes that state's "three tier" alcohol distribution system. 227 F.3d at 851. Among other things, the Indiana Code "permits local wineries, but not wineries 'in the business of selling . . . in another state or country', to ship directly to Indiana consumers." *Id.* The Seventh Circuit noted that Section 2 of the Twenty-first Amendment "empowers Indiana to control alcohol in ways that it cannot control cheese," *id.,* and also found that Section 2 "enables a state to do to the importation of liquor . . . what it chooses to do to the internal sales of liquor, but nothing more." *Id.* at 853. "Indiana insists that *every* drop of liquor passes through its three-tiered system and be subject to taxation. Wine originating in California, France,

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[13] The exemption at issue in *Kendall-Jackson* provided that Illinois wineries were not bound by the state's "Fair Dealing Act" which regulated "agreements between distributors and suppliers of liquor." 82 F. Supp.2d at 850. As discussed *infra,* a number of states, including New York, exempt in-state wineries from certain basic requirements of the three-tier system.

[14] Judge Easterbrook wrote the *Bridenbaugh* opinion for a two judge panel. *See* 227 F.3d at 848-49 n.* (citing 28 U.S.C. § 46(d)). A third panel member recused himself and did not participate in the consideration or decision of the case. *Id.*

Australia, or Indiana passes through the same three tiers and is subjected to the same taxes. Where's the functional discrimination?" *Id.*[15]

Following the Seventh Circuit's decision in *Bridenbaugh,* United States District Court Judge Melinda Harmon of the Southern District of Texas granted a motion for reconsideration in *Dickerson,* 87 F. Supp. 2d 691, to allow the parties to address the impact of *Bridenbaugh. Dickerson v. Bailey,* 212 F. Supp. 2d 673, 675 (S.D. Tex. 2002). Upon reconsideration, Judge Harmon adhered to her prior determination that the Texas Alcoholic Beverage Code was unconstitutional, finding that it imposed "differing burdens on in- and out-of-state [wine] producers so as to favor in-state wineries." *Id.* at 694. The Texas three-tier system includes certain legislative exceptions or exemptions that allow in-state, but not out-of-state, wineries to ship directly to Texas consumers. *Id.* at 677. "Because out-of-state producers must go through Texas-licensed wholesalers and retailers to sell wine in Texas, they suffer higher costs which translate into higher prices, which in turn affect their ability to compete with local Texas wineries." *Id.* at 694-95. The Texas ABC law was not "saved" by the Twenty-first Amendment because the state failed "to demonstrate how a statutory exception for local wineries from Texas' three-tier regulatory system

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[15] The court in *Bridenbaugh* rejected the plaintiff's contention that a provision of the Indiana code that allowed (only) holders of wine wholesaler or retailer permits to ship wine directly to Indiana consumers' homes was discriminatory, presumably because permit holders could "deliver California and Indiana wines alike; firms that do not hold permits may not deliver wine from either (or any) source." 227 F.3d at 853.

. . . is justified by any of the traditional core concerns of the twenty-first amendment." *Id.* The court enjoined Texas from enforcing its ban on direct importation (shipment) of wine. *Id.* at 696.

A number of other courts have addressed Commerce Clause challenges to bans on the direct shipping of wine. In *Bainbridge v. Bush,* the District Court for the Middle District of Florida upheld Florida's ban on direct shipment of wine. 148 F. Supp. 2d 1306, 1309 (M.D. Fla. 2001). The court found that the Florida three-tiered system "directly discriminates against out-of-state wineries in violation of the . . . dormant commerce clause . . . by expressly prohibiting out-of-state wineries from shipping their wine directly to non-licensed Florida residents." *Id.* at 1311 (emphasis omitted). "In contrast, in-state wineries have the option of becoming licensed as vendors, thereby avoiding the increased costs of the three-tiered system." *Id.* Florida's statute was nevertheless "saved" because it was a valid exercise of the state's powers under the Twenty-first Amendment. Despite "protectionist overtones", the Florida statute was said to advance the core concerns of temperance and revenue collection. *Id.* at 1313. "Invalidation of the scheme would hinder [Florida's] ability to tax alcoholic beverages sold within the state." *Id.*

On November 8, 2002, the United States Court of Appeals for the Eleventh Circuit vacated the decision in *Bainbridge* and remanded the case to the district court. *Bainbridge v. Turner,* 311 F.3d 1104, 2002 U.S. App. LEXIS 22986, 2002 WL 31487618 (11th Cir. Nov. 8, 2002). The court of appeals agreed with the district court's determination that the Florida direct shipping ban was facially discriminatory, but found that a question of fact remained as to whether the "regulatory scheme is so closely related to

the core concern of raising revenue as to escape Commerce Clause scrutiny." 311 F.3d 1104, 2002 U.S. App. LEXIS 22981, WL at *7 ("Before the State can successfully raise the Twenty-first Amendment as a shield, it must show that its statutory scheme is necessary to effectuate the proffered core concern in a way that justifies treating out-of-state firms differently from in-state firms – a fact question.")[16]

In *Heald v. Engler,* 00 Civ. 71438, Slip. Op. (E.D. Mich. Sept. 28, 2001), the district court found that "direct shipment laws are a permissible exercise of state power under § 2 of the 21st Amendment." Slip Op. at 8. Michigan's three-tiered distribution system contained an "exemption" that allowed in-state wineries, but not out-of-state wineries, to ship directly to consumers. Slip Op. at 3. The court determined that because the Twenty-first Amendment gave states "virtually complete control" over alcohol regulation, a state's action pursuant to the Twenty-first Amendment would only violate the Commerce Clause if it constituted "mere economic protectionism." Slip Op. at 9. Michigan's law was not mere economic protectionism because it was designed to "ensure the collection of taxes" and "reduce the risk of alcohol falling into the hands of minors." Slip Op. at 10.

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[16] In reaching its decision, the Eleventh Circuit found that "interests besides temperance, such as ensuring orderly market conditions and raising revenue are 'unquestionably legitimate' under the Twenty-first Amendment." *Bainbridge,* 2002 U.S. App. LEXIS 22986, 2002 WL 31487618 at *6 (quoting *North Dakota v. United States,* 495 U.S. 423, 432, 109 L. Ed. 2d 420, 110 S. Ct. 1986 (1990)).

Two (other) district courts have found direct shipment laws to be unconstitutional. In *Bolick v. Roberts*, 199 F. Supp. 2d 397 (E.D. Va. 2002), the District Court for the Eastern District of Virginia adopted a Magistrate Judge's report and recommendation that the Virginia direct shipping ban was unconstitutional. 199 F. Supp. 2d at 416. Virginia's three-tiered system "is a misnomer when applied to in-state producer/licensees. It is accurate to state that in-state producer licensees do not have to pass their products through each tier that an out-of-state entity must." *Id.* at 409. **"This is the very definition of a facially discriminatory law."** *Id.* at 407 (emphasis added). The court found that Virginia had not established "that there are no other nondiscriminatory means of enforcing [its] legitimate interests," *id.* at 409, and held that the Twenty-first Amendment did not shield (or save) the direct shipping ban. *Id.* at 411. With respect to remedies, the district court disagreed with the magistrate's recommendation that the exceptions to Virginia's three-tiered system, which (unlawfully) favored in-state wineries, could be severed from the rest of the statute. *Id.* at 415-16; *compare id.* at 450 (Report and Recommendation) ("It is therefore clear that the unconstitutional provisions can be segregated from the Act as a whole and while the Plaintiffs object to the constitutionality of the entire Act's closed system . . . case law . . . does not require the Court to recommend that the entire statutory scheme be declared unconstitutional.") The district court determined that the importation bans were unconstitutional and enjoined their enforcement. *Id.* at 416 ("Declaring unconstitutional and enjoining the enforcement of each of the challenged statutes effects the intent of the legislature, serves the interests of the consumer and dormant Commerce Clause, and preserves the police powers of the

Commonwealth to further its legitimate interests under the ABC regime.").

In *Beskind v. Easley,* 197 F. Supp. 2d 464 (W.D.N.C. 2002), plaintiffs challenged North Carolina's ABC laws, which required most, but not all, of the alcohol sold in North Carolina to pass through a three-tiered system. Plaintiffs objected to an exception in the law which allowed "North Carolina wineries that are licensed to do business in the state [to] bypass the wholesaler and retailer and ship wine directly to North Carolina consumers." *Beskind,* 197 F. Supp. 2d at 467. The court found that the "ABC laws present a relatively cut and dry example of direct discrimination against interstate commerce," and rejected the contention that the Twenty-first Amendment "saved" the regulations. *Id.* at 471 (emphasis omitted). "North Carolina can use the [Twenty-first] Amendment to protect the overall [three-tiered] system, because the system promotes purposes of the Twenty-first Amendment. But it cannot use the Amendment to protect the exception from the Commerce Clause, because the exception does not fulfill a purpose of the Amendment." *Id.* at 474. The court enjoined North Carolina from enforcing the provisions of the law "that prohibit or punish out-of-state wine dealers from directly shipping wines to adult North Carolina residents." *Id.* at 476.

V. Analysis

"No alcoholic beverages shall be shipped into the state unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages." NY ABC Law

§ 102(1)(c). Under New York's three-tiered system, permits are issued for "manufacturers, distributors, and retailers."[17] *Bridenbaugh*, 227 F.3d at 851. Out-of-state wineries must, under New York law, participate in New York's three-tier distribution system if they wish to sell wine to New York consumers.

The New York ABC Law also includes (several) significant "exceptions" to the three-tier regulatory scheme which clearly benefit in-state wineries. The exceptions include: (i) a "farm-winery" exception authorizing (licensed) New York farm wineries to ship wine directly to New York consumers;[18] (ii) an exception that allows New York wineries to offer "wine by wire services whereby a winery within the state may make deliveries on behalf of other wineries within the state" (§ 76-5); (iii) an exception for New York commercial wineries to obtain retail sales licenses that allows direct sale (and shipment) to consumers (§ 76-4); and (iv) an exception which permits delivery

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[17] "Virtually all retail sales of wine to consumers in the state must be made by a licensed retailer. . . . " Defendants' Statement of Facts, dated Aug. 17, 2001 at ¶ 46.

[18] " 'Farm winery' is defined as a winery which is **located on a farm in New York State**. Farm winery licensees must manufacture their wine only from New York State grapes, grown of farms operated by persons having . . . at least a 50% financial interest in the license, and cannot use any grapes grown by a person who does not have a financial interest in the license. Farm wineries are limited to the manufacture of no more than 50,000 finished gallons of wine annually." State Liquor Authority Divisional Order No. 714, ¶ 4, dated Aug. 31, 1976 (emphasis added). *But see Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. 850, 858 (S.D.N.Y. 1986) (finding that New York statute allowing only "wine product" made exclusively from in-state grapes to be sold in grocery stores was "plain and simple economic protectionism of New York grown grapes . . . and a violation of the commerce clause").

of alcoholic beverages in vehicles owned and operated by the (New York winery) licensee or hired from a trucking company registered with the New York liquor authority (§ 105-9). The obvious purpose and effect of these exceptions is that **"in-state wineries can bypass the middle tier (wholesalers) and the bottom tier (retailers) and sell directly to consumers."** *Beskind,* 197 F. Supp. 2d at 467 (emphasis added).

A. Commerce Clause

"Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *South-Central Timber Dev., Inc. v. Wunnicke,* 467 U.S. 82, 87, 81 L. Ed. 2d 71, 104 S. Ct. 2237 (1984). "This negative restriction on state power has often been labeled the 'dormant' Commerce Clause." *USA Recycling, Inc. v. Town of Babylon,* 66 F.3d 1272, 1281 (2d Cir. 1995).

The Supreme Court has established a two-step approach to determine whether a state or municipal law violates the dormant Commerce Clause. *See Gary D. Peake Excavating Inc. v. Town Bd. of Hancock,* 93 F.3d 68, 73 (2d Cir. 1996). "Under the first step, we determine whether the challenged law 'regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce.'" *Id.* at 73-74 (quoting *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality Comm'n,* 511 U.S. 93, 93, 128 L. Ed. 2d 13, 114 S. Ct. 1345 (1994)); *see also C & A Carbone v. Town of Clarkstown,* 511 U.S.

383, 390, 128 L. Ed. 2d 399, 114 S. Ct. 1677 (1994). A state or local law (directly) discriminates if it provides, as the New York ABC law does, for "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *USA Recycling,* 66 F.3d at 1281; *see also Sal Tinnerello & Sons Inc. v. Town of Stonington,* 141 F.3d 46, 55 (2d Cir. 1998). Under the second step, i.e. if a regulation is discriminatory, "the burden shifts to the state or local government to show that the local benefits of the statute outweigh its discriminatory effects, and that the state or municipality lacked a nondiscriminatory alternative that could have adequately protected the relevant local interests." *USA Recycling,* 66 F.3d at 1281-82. "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state interests over out-of-state interests, [courts] have generally struck the statute down without further inquiry." *Brown-Forman Distillers v. N.Y. State Liquor Auth.,* 476 U.S. 573, 579, 90 L. Ed. 2d 552, 106 S. Ct. 2080 (1986) A discriminatory restriction on commerce is "virtually *per se* invalid." *USA Recycling,* 66 F.3d. at 1281 (quoting *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970)).

Defendants contend (unconvincingly) that New York's ABC Law "erects no barrier to the flow of goods and imposes no burden on interstate commerce." Def. Mem. at 14. Defendants argue that the "overwhelming majority of the wine sold in New York – 93.3% – comes from outside the state," in an effort to show "that the system currently

in place does not impede the flow of goods into New York in any way." Def. Mem. at 15.[19]

That the New York direct shipping ban on out-of-state wine burdens interstate commerce and is discriminatory (on its face) is clear from the very wording (let alone the impact) of the exemptions favoring in-state wineries.[20] While out-of-state wineries must consign their products to a (three-tier) wholesaler, in-state wineries do not.[21] Many,

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[19] Defendants take the position that much of the wine sold in New York "comes from outside the state," but also argue that "out-of-state wines do not compete with New York wholesalers or wines." Def. Mem. at 19 (citing *General Motors Corp. v. Tracy*, 519 U.S. 278, 136 L. Ed. 2d 761, 117 S. Ct. 811 (1997)). *But see Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 269, 82 L. Ed. 2d 200, 104 S. Ct. 3049 (1984) ("On the stipulated facts of this case, we are unwilling to conclude that no competition exists between the exempted and nonexempted liquors.")

[20] The Court is **not** here ruling that New York's three-tier system (standing alone and apart from its exceptions) is unconstitutional. The Court recognizes that pursuant to the Twenty-first Amendment, the state may adopt reasonable regulations with regard to direct shipments, so long as they are not protectionist. *See, e.g., North Dakota v. United States*, 495 U.S. 423, 431, 109 L. Ed. 2d 420, 110 S. Ct. 1986 (1990).

[21] Defendants also argue that Plaintiffs have "stipulated away any claim that the in-state delivery options constitute a discriminatory local preference," Def. Mem. 21. That is, Defendants point out that the parties have entered into a written agreement (stipulation) that provides: "Plaintiffs challenge in this case only [NY ABC] §§ 102(1)(a),(c), and (d)." Stipulation dated March 28, 2001 (attached as Exhibit 16 to the Declaration of Randy Mastro dated Aug. 17, 2001 ("Mastro Dec."). Plaintiffs do not disavow the stipulation, but rather explain that in their view, the exceptions serve to render the direct shipping ban on out-of-state wine in the N.Y. ABC law unconstitutional. Transcript of Oral Argument, dated April 17, 2001 ("Tr.") at 10 ("The defendants have mischaracterized the fact that we are not challenging the exemptions with abandoning any sort of claim with regard to the exemptions.") *See also* Pl. Mem. at 13 n.16 ("Plaintiffs do not challenge

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if not most in-state wineries fall under one or more of the exceptions to the New York ABC Law.[22] To paraphrase Judge Easterbrook, every drop of (**only**) out-of-state wine must pass through New York's three-tier system. Wine produced in-state may bypass at least two tiers.[23] The New York regime constitutes a "cut and dry example of **direct** discrimination against interstate commerce." *Beskind,* 197 F. Supp. 2d at 471. That the in-state exemptions may apply to a relatively small portion of the total wine purchased in the state is not dispositive. *See Wyoming v. Oklahoma,* 502 U.S. 437, 455, 117 L. Ed. 2d 1, 112 S. Ct. 789 (1992) ("The volume of commerce affected measures only the *extent* of discrimination; it is of no relevance to the determination whether a State has discriminated against interstate commerce.")

The evidence here demonstrates, upon summary judgment, that the exceptions to the ABC Law provide an impermissible economic benefit and (protection) to only in-state interests – but also that there are nondiscriminatory alternatives available. Indeed, the Defendants explicitly

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these exemptions. To the contrary, plaintiff consumers benefit from them, and plaintiff winemakers simply wish to share in the opportunities.")

[22] "Many if not most New York wineries are farm wineries." Affidavit of Plaintiffs' Expert John Dyson dated May 24, 2001, ¶ 12; *see also* Tr. at 17 ("In fact, there are four different exemptions that cover virtually every winery in the state.") (Plaintiffs' counsel at oral argument).

[23] For example, a licensed farm winery, under N.Y. ABC Law § 76-a(6)(d), may direct ship to New York consumers. Similarly, a New York State winery may also become a licensed retailer, and sell wine (and ship directly to consumers) without first consigning it to a wholesaler. *See* N.Y. ABC Law §§ 76(4), 105-9.

concede the exceptions were intended to be protectionist. *See, e.g.*, State Liquor Authority Divisional Order No. 714, ¶ 4, dated Aug. 31, 1976 ("The [farm winery license] bill, adopted in an effort to aid New York State grape growers, creates a 'Farm Winery License,' specifying a low annual license fee of $125.")[24] At oral argument, the Attorney General acknowledged that economic protectionism was the core purpose of the exceptions. "Your Honor, I believe that the legislative history of that provision [the farm winery exemption] indicates that there was an effort to provide an economic benefit to the local farmers." Tr. at 58. *See also Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 271, 82 L. Ed. 2d 200, 104 S. Ct. 3049 (1984) ("Thus, we need not guess at the legislature's motivation, for it is undisputed that the purpose of the exemption was to aid Hawaiian industry.")

Defendants contend (unconvincingly) that out-of-state wineries "could very easily . . . get a license here to distribute as either a wholesaler or a winery," which would "cost 'probably a few to maybe 10,000 dollars, counting legal fees' to obtain the license in the first place and then only 'a few hundred dollars a year' to maintain it, to have an office or presence." *See* Tr. at 64 (citing Affidavit of John Dyson). It appears unreasonable to this Court to require

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[24] Approximately eighty percent of New York State wineries have farm winery licenses. Of the 110 New York wineries that responded to a National Agricultural Statistics survey, 90 had a farm license and 20 had a commercial license. *See* "Survey of Wineries and Grape Processing Plants," U.S. Department of Agriculture, National Agricultural Statistics Service (released January 24, 2001) *available at* http://www.nass.usda.gov/ny/bulletin/winery/license.htm. ("USDA Survey"), Mastro Dec. Exh. 10.

that an out-of-state winemaker "become a resident in order to compete on equal terms." *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64, 72, 10 L. Ed. 2d 202, 83 S. Ct. 1201 (1963). "The Supreme Court views 'with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually per se illegal.'" *Santa Fe Natural Tobacco Co. v. Spitzer,* 2001 U.S. Dist. LEXIS 7548, 00 Civ. 7274, 2001 WL 636441, *16 (S.D.N.Y. June 8, 2001) (quoting *South-Central Timber Dev., Inc. v. Wunnicke,* 467 U.S. 82, 100, 81 L. Ed. 2d 71, 104 S. Ct. 2237 (1984)).[25]

Most courts that have addressed a statutory structure similar to New York's – i.e. a three-tier system which includes a general ban on the direct shipment of out-of-state wine but also contains "loopholes" in the form of exceptions for in-state wineries – have found the schemes to be per se violations of the Commerce Clause. *See Bainbridge,* 311 F.3d at 1104, 2002 U.S. App. LEXIS 22986, W.L. at *3 ("Florida's regulatory scheme cannot withstand tier-one [dormant commerce clause] scrutiny."); *Beskind,* 197 F. Supp. 2d at 471 ("The North Carolina ABC law facially discriminates against out-of-state manufacturers. . . ."); *Bolick,* 199 F. Supp. 2d at 409 ("Discrimination occurs as a result of the in-state

[25] Again, this is not to say that the entire New York three-tier system is unconstitutional or that the State does not "enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within [its] borders." *Capital Cities,* 467 U.S. at 714.

preference for entry into the market and direct shipment to consumers. . . ."); *Dickerson,* 212 F. Supp. 2d at 694 ("Texas' ban on direct importation of wine . . . on its face is unconstitutionally and economically discriminatory."); *See also Santa Fe,* 2001 U.S. Dist. LEXIS 7548, [WL] at *14 ("Thus, the statute discriminates on its face against commerce by providing a delivery exemption for New York brick-and-mortar businesses with their own delivery services.") (discussing cigarettes). This Court reaches a similar conclusion. The statutory ban on the direct shipment to New York of out-of-state wine is **not** "evenhanded" and constitutes a *per se* violation of the Commerce Clause. *See Brown-Forman,* 476 U.S. at 579.

B. Twenty-First Amendment

Defendants contend that even if the direct shipping ban on wine were found to be discriminatory, as here, it is "justified 'both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.'" Def. Mem. at 25 (quoting *Hughes v. Oklahoma,* 441 U.S. 322, 336, 60 L. Ed. 2d 250, 99 S. Ct. 1727 (1979)). Defendants argue that the direct shipping ban is "a narrowly tailored exercise of the State's police power to control access to alcoholic beverages, to further the interests of public health, welfare and safety, and to promote temperance," and is, therefore, "impervious to Plaintiffs' 'dormant' Commerce Clause challenge under any level of scrutiny." Def. Mem. at 26. Thus, the Defendants argue that New York's three-tiered system is "saved" by the Twenty-first Amendment. *See, e.g., Bainbridge,* 148 F. Supp. 2d at 1310 ("If the statutory scheme violates the commerce clause, it must then be determined whether it is

saved by the Twenty-First Amendment.") Plaintiffs counter that "only those state restrictions which directly promote temperance may now be said to be permissible under section 2 of the 21st Amendment," Pl. Mem. at 7 (citing *Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. 850, 861 (S.D.N.Y. 1985)), and "that the direct shipment ban cannot be saved by this sole permissible justification." Pl. Mem. at 23. Plaintiffs also argue that the "State has a variety of less-restrictive alternatives available to it." Pl. Reply at 11.

The Court concludes that it is doubtful whether the ABC Laws – and particularly the exceptions – are grounded in the promotion of temperance but that, in any event, viable (socially conscious) alternatives to discrimination against out-of-state wineries are available.[26] The United States Supreme Court has observed that "the State has 'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system," and that "the States have the power to control shipments of liquor during their passage through their territory and to take appropriate steps to prevent the unlawful diversion of liquor into their regulated intrastate markets." *North Dakota v. United States*, 495 U.S. 423, 431, 109 L. Ed. 2d 420, 110 S. Ct. 1986 (1990) (plurality opinion) (quoting *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110, 63 L. Ed. 2d 233,

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[26] While respectfully disagreeing with Defendants' legal position, the Court has paid careful attention to the position of outstanding community leaders such as the Reverend Calvin O. Butts, III (*see* Affidavit, dated Aug. 14, 2001), intervening groups and organizations, and amici such as the City University of New York (*see* Declaration of Frederick P. Schaffer, dated Aug. 14, 2001).

100 S. Ct. 937 (1980)). At the same time, the Twenty-first Amendment does not shield all state regulations from the reach of the Commerce Clause. In fact, the Supreme Court has also said that it would be an "absurd oversimplification" to draw such a conclusion. *See Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32, 12 L. Ed. 2d 350, 84 S. Ct. 1293 (1964). "It is well settled that the Twenty-first Amendment did not entirely remove state regulation of alcohol from the reach of the Commerce Clause." *Brown-Forman,* 476 U.S. at 584. "Rather the Twenty-first Amendment and the Commerce Clause 'each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case.'" *Id.* (quoting *Hostetter,* 377 U.S. at 332).

A question here is "whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the exception[s] for [in-state] wine to outweigh the Commerce Clause principles that would otherwise be offended. Or . . . asked in a slightly different way, 'whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.'" *Bacchus,* 468 U.S. at 275-76 (quoting *Capital Cities,* 467 U.S. at 714). **"State laws that constitute mere economic protectionism are . . . not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor."** *Bacchus,* 468 U.S. at 276 (emphasis).

Defendants have not shown that New York's ban on the direct shipment of out-of-state wine, and particularly the in-state exceptions to the ban, implicate the State's core concerns under the Twenty-first Amendment. As noted, the

exceptions were enacted to "provide an economic benefit to the local farmers." Tr. at 58. There is evidence in the record that the direct shipping ban was designed to protect New York State businesses from out-of-state competition. *See, e.g.,* Governor's Bill Jacket, 1970 Chapter 242, dated Apr. 24, 1970 at 10 (Memorandum from State Liquor Authority) ("It is manifestly unfair to permit these [out-of-state] unlicensed mail-order concerns to compete with New York State Licensees."); *House of York, Ltd. v. Ring,* 322 F. Supp. 530, 533 (S.D.N.Y. 1970) ("This law was enacted . . . to prevent what was considered to be an unfair and unwise form of competition with New York state licensees, and to eliminate unfair tax advantages to out-of-state mail order firms selling alcoholic beverages to New York residents.") "One thing is certain: The central purpose of the [Twenty-first Amendment] was not to empower states to benefit local liquor industries by erecting barriers to competition." *Bacchus,* 468 U.S. at 276.

Defendants argue that the core concerns that support the three-tier system generally would be undermined if the (benefits of) the in-state exceptions were extended to out-of-state wineries. *See, e.g.*, Def. Mem. at 11 ("New York's direct shipping ban has helped keep alcohol from reaching minors, but those gains will be lost if common carriers resume direct shipments to New Yorkers of all ages.")[27] Defendants contend that "the direct shipping ban

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[27] Among other evidence, Defendants point to data from the U.S. Department of Health and Human Services in an effort to show that "the incidence of binge drinking is 10.5% higher among all drinkers, and 16.5% higher among minors ages 12 to 17, in 'open' or 'reciprocity' states than in 'three-tier' states." Def. Mem. at 9 (citing Mastro Dec., Ex. 29). Plaintiffs argue that Defendants "fail to establish any nexus

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is the only effective means by which the State can control and limit minors' access to alcoholic beverages." Def. Mem. at 25.[28] **The Court believes that the important goals of temperance and prohibiting the sale of wine to minors can be addressed (in a nondiscriminatory manner) for out-of-state as well as for in-state wineries (which are currently able to sell their products over the internet and to ship directly to homes in New York State).** *See, e.g., Bainbridge,* 311 F.3d at 1104, 2002 U.S. App. LEXIS 22986, WL at *3 ("Florida could license and regulate out-of-state wineries that intend to ship to Florida consumers through a licensing process similar to that employed with in-state wineries."). As Plaintiffs point out, "the exemption for in-state firms undercuts the defense, for the same safeguards can be taken to ensure compliance of out-of-state products with health and safety concerns." Pl. Mem. at 23-24 (citing *Loretto,* 601 F. Supp. at 862).[29]

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between that problem and wine in general, the types of wine at issue in this case, or direct shipping of wine." Pl. Reply at 8.

[28] *See also* Deposition Transcript of Defendants' Expert Henry Wechsler, dated Oct. 2, 2001 at 60 ("You'd have delivery services. You'd expand the number of alcohol outlets to practically every home in the community. This would make it much harder to get cooperation and training and enforcement of the minimum drinking age.") In response, Plaintiffs point out that Professor Wechsler has never "studied wine consumption or direct shipping" and lacks "any actual knowledge of how direct shipping works or what impact it would have on alcohol consumption patterns." Pl. Reply at 8 n.24.

[29] Defendants acknowledge that "third party common carriers" can and currently do verify the age of purchasers to whom they deliver alcoholic beverages. "eVineyards [an online retailer] ensures delivery by an adult 21-years or older by using only state approved common carriers to complete its deliveries. These carriers gather an adult

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Defendants also express concern over the potential for evasion of state liquor taxes if the in-state direct shipping exceptions were extended to out-of-state wineries. Def. Mem. at 25-26. ("The collection of taxes is likewise assured only by requiring that alcoholic beverages be imported into New York by persons who are accountable to the State. . . . ") As a threshold matter, it is not entirely clear that the collection of taxes is, in and of itself, a core concern of the Twenty-first Amendment.[30] Assuming *arguendo* that the core interests under the Twenty-first Amendment include raising revenue, a state may not advance that interest by (any) discriminatory means – i.e. if there are "reasonable nondiscriminatory alternatives." *Oregon Waste,* 511 U.S. at 101. In *Bacchus,* the Supreme Court overturned a Hawaii tax provision that applied a 20 percent excise tax on liquor sold at wholesale, but exempted two locally

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signature at delivery time and submit to eVineyard." Defendants' Statement of Facts, dated Aug. 17, 2001 at ¶ 117.

[30] While Defendants argue that the United States Supreme Court has found that " 'raising revenue' is one of the 'unquestionably legitimate' state interests that fall within a state's 'core' power under the Twenty-first Amendment," Def. Reply at 9 (quoting *North Dakota,* 495 U.S. at 432), Plaintiffs respond that in the Second Circuit, "only those restrictions which directly promote temperance may now be said permissible under Section 2 of the Twenty-first Amendment." *Loretto,* 601 F. Supp. at 861. In *North Dakota,* Justice Stevens, in a plurality opinion, noted that: "In the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate." 495 U.S. at 432. The Court, of course, has no quarrel with that finding – but questions whether each of the interests referenced in *North Dakota* is, standing alone, sufficient to outweigh a discriminatory ban upon the direct shipment of out-of-state wine. Indeed, "no clear consensus concerning the meaning of the provision is apparent." *Bacchus,* 468 U.S. at 274.

produced forms of alcohol.[31] 468 U.S. at 265. The Court found that "the State does not seek to justify its tax on the ground that it was designed to promote temperance or carry out any other purpose of the Twenty-first Amendment, but instead acknowledges that the purpose was 'to promote local industry.'" *Id.* at 276. Similarly, New York's discriminatory exemptions, which are designed to promote local industry, are not saved because they may impact the raising of revenue. *See id.* ("Consequently, because the tax violates a central tenet of the Commerce Clause but is not supported by any clear concern of the Twenty-first Amendment, we reject the State's . . . claim based on the Amendment."); *see also Bainbridge,* 311 F.3d 1104, 2002 U.S. App. LEXIS 22986, WL at *7 ("We do not think it is sufficient, however, for Florida to simply show that (a) taxation is a 'core concern' and (b) the three-tier distribution scheme, although discriminatory, promotes its revenue raising goals."); *Beskind,* 197 F. Supp. 2d at 474 ("Economic protectionism is not the purpose of this safe harbor from the Commerce Clause.").

The Court does not discern that "the statutes advance 'a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" *Cooper v. McBeath,* 11 F.3d 547, 553 (5th Cir. 1994) (quoting *New England Energy Co. of Ind. v. Limbach,* 486 U.S. 269, 278, 100 L. Ed. 2d 302, 108 S. Ct. 1803 (1988)). For one thing, New York currently allows direct shipment of in-state wine in a manner that accommodates the State's concerns for minors, temperance and revenue collection.

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[31] The Hawaii statutory scheme, like the New York ABC Law, was originally enacted without exemptions. *Bacchus,* 468 U.S. at 265.

See, e.g., supra n.29; *see also Dickerson,* 87 F. Supp. 2d at 710 ("There is no temperance goal served by the statute since Texas residents can become as drunk on local wines . . . as those that . . . are in practical effect kept out of the state by the statute.") Defendants' contention that "New York simply has no other effective means to control the unfettered access to alcoholic beverages that would ensue if this direct shipping ban were eliminated," (Def. Mem. at 25) is further contradicted by the facts that: (i) historically direct shipment of out-of-state wine for personal consumption was permitted in New York, *see People v. Ryan,* 274 N.Y. 149, 153, 8 N.E.2d 313 (1937) ("no purpose or intent is found to control their personal use"); (ii) as recently as 1995 the State Legislature was amenable to direct shipping and passed a "reciprocity" bill allowing for direct shipment of wine to New York residents from states that allowed direct shipment of New York wine to their residents, *see* Governor's Veto Jacket, 1995 Veto 76, dated Dec. 27, 1995 at 5; and (iii) very recent (November 2002) federal legislation has authorized direct shipment of wine for personal use, *see* Direct Shipment of Wine, H.R. 2215, 107th Cong., Sec. 11022 (2002) (enacted). The State has not established that its legitimate goals cannot be accomplished in a nondiscriminatory manner. *See Bolick,* 199 F. Supp. 2d at 409 ("The question is whether the state can accomplish its legitimate interests without discriminating against out-of-state direct shippers of wine. . . . This they have not done.")

C. Recent Federal Legislation

Defendants argue that the "new federal Direct Shipping Statute stands as Congress' renunciation of federal interest in all direct shipping bans to the extent they are untouched by this new law."[32] Letter from Howard Graff, dated Nov. 4, 2002. Plaintiffs respond that the "provision has no impact on our claims regarding the impermissibility of New York's direct shipping ban under the dormant Commerce Clause." Letter from Clint Bolick, dated Nov. 8, 2002.

"It is well established that Congress may authorize the States to engage in regulation that the Commerce Clause would otherwise forbid." *Maine v. Taylor,* 477 U.S. 131, 138, 91 L. Ed. 2d 110, 106 S. Ct. 2440 (1986); *see also*

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[32] The law, entitled "Direct Shipment of Wine", provides (in part):

> a) CONDITIONS FOR TRANSPORTING CERTAIN WINE. – During any period in which the Federal Aviation Administration has in effect restrictions on airline passengers to ensure safety, the direct shipment of wine shall be permitted from States where wine is purchased from a winery, to another State or the District of Columbia, if –
>
> (1) the wine was purchased while the purchaser was physically present at the winery;
>
> (2) the purchaser of the wine provided the winery verification of legal age to purchase alcohol;
>
> (3) the shipping container in which the wine is shipped is marked to require an adult's signature upon delivery;
>
> (4) the wine is for personal use only and not for resale; and (5) the purchaser could have carried the wine lawfully into the State or the District of Columbia to which the wine is shipped.

H.R. 2215, 107th Cong., Sec. 11022 (2002) (enacted).

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 154, 71 L. Ed. 2d 21, 102 S. Ct. 894 (1982). "But because of the important role the Commerce Clause plays in protecting the free flow of interstate trade, this Court has exempted state statutes from the implied limitations of the Clause only when the congressional direction to do so has been 'unmistakably clear.'" *Taylor,* 477 U.S. at 138-39 (quoting *Wunnicke,* 467 U.S. at 91).

It is **not** "unmistakably clear" that Congress intended to exempt New York's ABC Law from the limitations of the Commerce Clause. To the contrary, by its terms, the Direct Shipping Statute applies only to the direct shipment of wine purchased in person at an out-of-state winery during a time when the FAA has imposed safety restrictions and the purchaser would have been able to carry the wine into their home state. *See Wunnicke,* 467 U.S. at 92 ("A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce.") The new law does not insulate New York's direct shipping ban. *See, e.g., Sporhase v. Nebraska,* 458 U.S. 941, 959-60, 73 L. Ed. 2d 1254, 102 S. Ct. 3456 (1982) ("Although the 37 [Congressional] statutes and the interstate compacts demonstrate Congress' deference to state water law, they do not indicate that Congress wished to remove federal constitutional constraints on such state laws.")

D. Privileges and Immunities

Plaintiffs contend that the Privileges and Immunities Clause of the United States Constitution "protect[s] the right[s] of the plaintiff winemakers to pursue their chosen

livelihoods free from arbitrary and discriminatory burdens." Pl. Mem. at 9. Specifically, Plaintiffs Juanita Swedenburg and David Lucas, in their individual capacities, *see Swedenburg,* 2000, U.S. Dist. LEXIS 12758 [WL] at *11, argue that the direct shipment ban impairs their right to sell wine. Pl. Mem. at 9. Defendants opposition is two-fold: (i) "because plaintiffs have no viable 'dormant' Commerce Clause claim, they also have no viable Article IV Privileges and Immunities Clause claim," Def. Mem. at 29; and (ii) "the State has 'substantial' and 'perfectly valid independent' reasons for requiring out-of-state wine products to be distributed [in New York] only through licensed in-state wholesalers." *Id.*

In view of the Court's determination that the New York ban on the direct shipment of out-of-state wine violates the Commerce Clause, and the limited briefing on the Privileges and Immunities question, there is no need for the Court further to address this claim. *See, e.g., Barringer v. Griffes,* 1 F.3d 1331, 1332 (2d Cir. 1993).

E. First Amendment

Plaintiffs contend that ABC Law § 102(1)(a) "is a sweeping regulation of speech" and "is blatantly unconstitutional." Pl. Mem. at 28. Defendants counter that the provision is a "narrowly tailored restriction on commercial advertising for alcoholic beverages [that] is plainly aimed at preventing the unlawful solicitation of orders for direct shipments of alcohol to New York residents by unlicensed suppliers." Def. Mem. at 29 (emphasis in original). Having concluded that New York's ban on direct shipment of wine into the state is unconstitutional, Section 102(1)(a) may similarly, going

forward, be read to prohibit lawful solicitations on behalf of out-of-state wineries – and needs to be revised.

F. Appropriate Remedy

At the Court's request, following oral argument the parties submitted (additional) briefing on the question of whether (or not) the Court should strike down the protectionist in-state direct shipping exceptions to the New York ABC Laws if it found a violation of the Commerce Clause.[33] Defendants' counsel, including the Attorney General, argue that the Court should "sever and invalidate only those few provisions of New York's ABC Law that permit any in-state direct shipment options and otherwise preserve New York's constitutional 'three tier' system." Defendants' Memorandum on Remedy, dated April 19, 2002.[34] Plaintiffs ask the Court to "establish a truly level playing field" and "strike down the trade barrier and allow out-of-state wineries to ship on the same terms and conditions as in-state wineries." Letter from Clint Bolick, dated April 19, 2002.

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[33] The New York ABC Laws provide that if "any part, provision or section of this chapter or the application thereof to any person or circumstances shall be held invalid by any court of competent jurisdiction, the remainder thereof or the application of such part, provision or section to any other person or circumstances shall not be affected thereby." NY ABC § 161.

[34] Defendants point out that New York retains the "constitutional right to remedy the assumed discrimination by eliminating the in-state advantage." Defendants Memorandum or Remedy, dated April 19, 2002 at 7 (citing *McKesson Corp. v. Div. of Alc. Bev. and Tbb.*, 496 U.S. 18, 110 L. Ed. 2d 17, 110 S. Ct. 2238 (1990)).

"Where a statute is defective because of underinclusion . . . there exist two remedial alternatives: a court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion." *Califano v. Westcott,* 443 U.S. 76, 89, 61 L. Ed. 2d 382, 99 S. Ct. 2655 (1979) (quoting *Welsh v. United States,* 398 U.S. 333, 363, 26 L. Ed. 2d 308, 90 S. Ct. 1792 (1970) (Harlan, J. concurring)). "Though the Court has stated that 'extension rather than nullification is the proper course,' the question is ultimately one of legislative intent." *Soto-Lopez v. New York City Civ. Serv. Comm'n,* 755 F.2d 266, 280 (2d Cir. 1985) (citations omitted).

The Court's "task is to discern what course the Legislature would have chosen to follow if it had foreseen our conclusions as to underinclusiveness." *People v. Liberta,* 64 N.Y.2d 152, 170, 474 N.E.2d 567, 578, 485 N.Y.S.2d 207, 218 (1984). "The question is in every case whether the Legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the valid part exscinded, or rejected altogether." *People v. Knapp,* 230 N.Y. 48, 60, 129 N.E. 202, 207 (1920) (Cardozo, J.); *see also Gary D. Peake,* 93 F.3d at 72 ("the presence of a severability clause is not dispositive").

The record here – which reflects an earlier version of the New York ABC Law allowing direct shipment into New York for limited personal use and the Legislature's effort in 1995 to allow direct shipment on a reciprocal basis – suggests the route the Legislature might take. And,

severing the ABC Law exceptions might impose economic hardships on New York State wineries which the Legislature may be reluctant to do.[35] *See* Letter from Clint Bolick, dated April 19, 2002; *see also* USDA Survey ("In all but one region [of New York State], sales of wine directly to consumers was the predominant type of sales, generating the largest percentage of total sales dollars.")[36] Elimination of the direct shipping ban rather than elimination of the ABC Law exceptions may be the appropriate remedy. *See Nguyen v. INS,* 533 U.S. 53, 95-96, 150 L. Ed. 2d 115, 121 S. Ct. 2053 ("The choice of extension over nullification also would have the virtue of avoiding injury to parties who are not represented in the instant litigation.") (Scalia, J., concurring); *See also Bolick,* 199 F. Supp. 2d at 416 ("Declaring unconstitutional and enjoining the enforcement of each of the challenged statutes effects the intent of the legislature, serves the interests of the consumer and the dormant Commerce Clause, and preserves the police powers of the Commonwealth to further its legitimate interests under the ABC regime."); *Beskind,* 197 F. Supp. 2d at 476 ("Defendants are enjoined from enforcing state laws . . . that prohibit or punish out-of-state wine dealers from directly shipping wines to adult North Carolina residents."); *Dickerson,* 212 F. Supp. 2d at 696 ("[T]he Court, in the final judgment . . . will enjoin the State of

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[35] It would be helpful to hear from the Attorney General on this issue.

[36] These factors distinguish this case from *Loretto,* in which the Second Circuit found that certain preferences for New York State wine coolers could not stand "for even sixty days [more]." *Loretto,* 761 F.2d at 141.

Texas from enforcing these statutes and defer to action by the legislature to repair the Alcoholic Beverage Code.")

The Court would like to have additional input from the parties before deciding the issue of remedy, and will hold a conference for this purpose on December 5, 2002 at 11 a.m. in Courtroom 706 of the Thurgood Marshall Courthouse, 40 Centre Street, New York, New York. The parties are requested forthwith to "meet and confer" to determine whether consensus can be reached with respect to remedy. Additional briefing, which may become useful, is not called for at this time.

VI. Conclusion

For the aforementioned reasons, Plaintiffs' motion for summary judgment is granted and Defendants' motion for summary judgment is denied.

November 12, 2002

Dated: New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUANITA SWEDENBURG, *et al.*,	x	
Plaintiffs,	:	
-against-	:	00 Civ. 778 (RMB)
EDWARD F. KELLY, *et al.*,	:	**JUDGMENT**
Defendants.	:	
	x	

Recognizing that timely revision of New York's Alcoholic Beverage Control Law is the province of the Legislature, it is hereby,

ORDERED, ADJUDGED AND DECREED, that for the reasons stated in the Court's Decision and Order dated November 12, 2002, plaintiffs' motion for summary judgment is granted, that defendants' motion for summary judgement [sic] is denied, and that:

1. Defendants are enjoined from enforcing N.Y. Alco, and Bev. Cont. Law §§ 102(1)(c) and (d) in manner that would prohibit (i) the winery plaintiffs from shipping their wine to New York consumers on the same terms and conditions applicable to New York wineries and (ii) the consumer plaintiffs from receiving wines shipped directly to them from out-of-state wineries on the same terms and conditions applicable to consumers of New York wineries; and

2. Defendants are further enjoined from enforcing N.Y. Alco. and Bev. Cont. Law § 102(a) against the winery plaintiffs in a manner that would prevent them from conveying lawful information to New York consumers on the same

terms and conditions applicable to New York wineries; and

3. Enforcement of this judgment (and its injunctions) are stayed pending any appeal to the United States Court of Appeals for the Second Circuit or, if no appeal is taken, until expiration of the time for taking such appeal.

Dated: New York, New York
December 10, 2002

/s/ RMB
RICHARD M. BERMAN,
U.S.D.J.

U.S. Const., art. I, § 8, cl. 3 (Commerce Clause)

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .

U.S. Const. art. IV, § 2
(Privileges and Immunities Clause)

Clause 1: The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

U.S. Const. amend. XXI

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the states by the Congress.

TITLE 27. INTOXICATING LIQUORS

CHAPTER 6. TRANSPORTATION IN INTERSTATE COMMERCE

27 USCS § 121 (2003)

§ 121. State statutes as operative on termination of transportation; original packages

All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

TITLE 27. INTOXICATING LIQUORS

CHAPTER 6. TRANSPORTATION IN INTERSTATE COMMERCE

27 USCS § 122 (2003)

§ 122. Shipments into States for possession or sale in violation of State law

The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the

United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to bug subject to the jurisdiction thereof, which said spirituous, vinus, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.

TITLE 27. INTOXICATING LIQUORS

CHAPTER 6. TRANSPORTATION IN INTERSTATE COMMERCE

27 USCS § 122a (2003)

§ 122a. Injunctive relief in Federal district court

(a) Definitions. In this section –

(1) the term "attorney general" means the attorney general or other chief law enforcement officer of a State or the designee thereof;

(2) the term "intoxicating liquor" means any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind;

(3) the term "person" means any individual and any partnership, corporation, company, firm, society, association, joint stock company, trust, or other entity capable of holding a legal or beneficial interest in property, but does not include a State or agency thereof; and

(4) the term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

(b) Action by State attorney general. If the attorney general has reasonable cause to believe that a person is engaged in, or has engaged in, any act that would constitute a violation of a State law regulating the importation or transportation of any intoxicating liquor, the attorney general may bring a civil action in accordance with this section for injunctive relief (including a preliminary or permanent injunction) against the person, as the attorney general determines to be necessary to –

(1) restrain the person from engaging, or continuing to engage, in the violation; and

(2) enforce compliance with the State law.

(c) Federal jurisdiction.

(1) In general. The district courts of the United States shall have jurisdiction over any action brought under this section by an attorney general against any person, except one licensed or otherwise authorized to produce, sell, or store intoxicating liquor in such State.

(2) Venue. An action under this section may be brought only in accordance with section 1391 of title 28, United States Code, or in the district in which the recipient of the intoxicating liquor resides or is found.

(3) Form of relief. An action under this section is limited to actions seeking injunctive relief (a preliminary and/or permanent injunction).

(4) No right to jury trial. An action under this section shall be tried before the court.

(d) Requirements for injunctions and orders.

(1) In general. In any action brought under this section, upon a proper showing by the attorney general of the State, the court may issue a preliminary or permanent injunction to restrain a violation of this section. A proper showing under this paragraph shall require that a State prove by a preponderance of the evidence that a violation of State law as described in subsection (b) has taken place or is taking place.

(2) Additional showing for preliminary injunction. No preliminary injunction may be granted except upon –

(A) evidence demonstrating the probability of irreparable injury if injunctive relief is not granted; and

(B) evidence supporting the probability of success on the merits.

(3) Notice. No preliminary or permanent injunction may be issued under paragraph (1) without notice to the adverse party and an opportunity for a hearing.

(4) Form and scope of order. Any preliminary or permanent injunction entered in an action brought under this section shall–

(A) set forth the reasons for the issuance of the order;

(B) be specific in terms;

(C) describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and

(D) be binding upon.

(i) the parties to the action and the officers, agents, employees, and attorneys of those parties; and

(ii) persons in active concert or participation with the parties to the action who receive actual notice of the order by personal service or otherwise.

(5) Admissibility of evidence. In a hearing on an application for a permanent injunction, any evidence previously received on an application for a preliminary injunction in connection with the same civil action and that would otherwise be admissible, may be made a part of the record of the hearing on the permanent injunction.

(e) Rules of construction. This section shall be construed only to extend the jurisdiction of Federal courts in connection with State law that is a valid exercise of power vested in the States–

(1) under the twenty-first article of amendment to the Constitution of the United States as such article of amendment is interpreted by the Supreme Court of the United States including interpretations in conjunction with other provisions of the Constitution of the United States; and

(2) under the first section herein as such section is interpreted by the Supreme Court of the United States; but shall not be construed to grant to States any additional power.

(f) Additional remedies.

(1) In general. A remedy under this section is in addition to any other remedies provided by law.

(2) State court proceedings. Nothing in this section may be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any State law.

NEW YORK CONSOLIDATED LAW SERVICE

ALCOHOLIC BEVERAGE CONTROL LAW
ARTICLE 8. GENERAL PROVISIONS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

NY CLS Al Bev § 102 (2003)

§ 102. General prohibitions and restrictions

1. (a) No person shall send or cause to be sent into the state any letter, postcard, circular, newspaper, pamphlet, order kit, order form, invitation to order, price list, or publication of any kind containing an advertisement or a solicitation of any order for any alcoholic beverages, irrespective of whether the purchase is made or to be made within or without the state, or whether intended for commercial or personal use or otherwise, unless such person shall be duly licensed hereunder to traffic in alcoholic beverages.

(b) No person shall issue or publish or cause to be issued or published in the state any letter, postcard, circular, newspaper, pamphlet, order kit, order form, invitation to order, price list, or publication of any kind

containing an advertisement or a solicitation of any order for any alcoholic beverages, irrespective of whether the purchase is made or to be made within or without the state, or whether intended for commercial or personal use or otherwise, unless such person shall be duly licensed hereunder to traffic in alcoholic beverages.

(c) No alcoholic beverages shall be shipped into the state unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages. This prohibition shall apply to all shipments of alcoholic beverages into New York state and includes importation or distribution for commercial purposes, for personal use, or otherwise, and irrespective of whether such alcoholic beverages were purchased within or without the state, provided, however, this prohibition shall not apply to any shipment consigned to a New York resident who has personally purchased alcoholic beverages for his personal use while outside the United States for a minimum period of forty-eight consecutive hours and which he has shipped as consignor to himself as consignee. Purchases made outside the United States by persons other than the purchaser himself, regardless whether made as his agent, or by his authorization or on his behalf, are deemed not to have been personally purchased within the meaning of this paragraph.

(d) No common carrier or other person shall bring or carry into the state any alcoholic beverages, unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages, provided, however, that alcoholic beverages may be delivered by a trucking permittee from a steamship or railroad station or terminal to a New York resident who has personally purchased alcoholic beverages for his personal use while outside the

United States for a minimum period of forty-eight consecutive hours, and which he has shipped as consignor to himself as consignee, and except as so stated, no trucking permittee shall accept for delivery, deliver or transport from a steamship or railroad station or terminal any shipment of alcoholic beverages consigned to a non-licensed person having his home or business in New York state. Purchases of alcoholic beverages made outside the United States by persons other than the purchaser himself, regardless whether made as his agent, or by his authorization or on his behalf, are deemed not to have been personally purchased within the meaning of this paragraph.

(e) Subdivisions (c) and (d) hereof shall apply to alcoholic beverages, either in the original package or otherwise, whether intended for commercial or personal use, as well as otherwise, and to foreign, interstate, as well as intrastate, shipments or carriage, irrespective of whether such alcoholic beverages were purchased within or without the state.

(f) Nothing in this chapter shall be deemed to exempt from taxation the sale or use of any alcoholic beverages subject to any tax imposed under or pursuant to the authority of the tax law or to grant any other exemption from the provisions of such law.

2. No person holding any license hereunder, other than a license to sell an alcoholic beverage at retail for off premises consumption, shall knowingly employ in connection with his business in any capacity whatsoever, any person, who has been convicted of a felony, or any of the following offenses, who has not subsequent to such conviction received an executive pardon therefor removing any civil

disabilities incurred thereby, a certificate of good conduct or other relief from disabilities provided by law, or the written approval of the state liquor authority permitting such employment, to wit:

(a) Illegally using, carrying or possessing a pistol or other dangerous weapon;

(b) Making or possessing burglar's instruments;

(c) Buying or receiving or criminally possessing stolen property;

(d) Unlawful entry of a building;

(e) Aiding escape from prison;

(f) Unlawfully possessing or distributing habit forming narcotic drugs;

(g) Violating subdivisions six, eight, ten or eleven of section seven hundred twenty-two of the former penal law as in force and effect immediately prior to September first, nineteen hundred sixty-seven, or violating sections 165.25, 165.30 or subdivision three of section 240.35 of the penal law;

(h) Vagrancy or prostitution; or

(i) Ownership, operation, possession, custody or control of a still subsequent to July first, nineteen hundred fifty-four.

If, as hereinabove provided, the state liquor authority issues its written approval for the employment by a licensee, in a specified capacity, of a person previously convicted of a felony or any of the offenses above enumerated, such person, may, unless he is subsequently

convicted of a felony or any of such offenses, thereafter be employed in the same capacity by any other licensee without the further written approval of the authority unless the prior approval given by the authority is terminated.

The liquor authority may make such rules as it deems necessary to carry out the purpose and intent of this subdivision.

3. [Renumbered].

3-a. No licensee or permittee shall purchase or agree to purchase any alcoholic beverages from any person within the state who is not duly licensed to sell such alcoholic beverage as the case may be, at the time of such agreement and sale nor give any order for any alcoholic beverage to any individual who is not the holder of a solicitor's permit, except as provided for in section eighty-five or ninety-nine-g of this chapter.

3-b. No retail licensee shall purchase, agree to purchase or receive any alcoholic beverage except from a person duly licensed within the state by the liquor authority to sell such alcoholic beverage at the time of such agreement and sale to such retail licensee, except as provided for in section eighty-five or ninety-nine-g of this chapter.

4. No licensee or any of his or its agents, servants or employees shall peddle any liquor and/or wine from house to house by means of a truck or otherwise, where the sale is consummated and delivery made concurrently at the residence or place of business of a consumer. This subdivision shall not prohibit the delivery by a licensee to consumers, pursuant to sales made at the place of business of said licensee.

5. No licensee shall employ any canvasser or solicitor for the purpose of receiving an order from a consumer for any liquor and/or wine at the residence or place of business of such consumer, nor shall any licensee receive or accept any order, for the sale of any liquor and/or wine, which shall be solicited at the residence or place of business of a consumer. This subdivision shall not prohibit the solicitation by a wholesaler of an order from any licensee at the licensed premises of such licensee.

6. No alcoholic beverage shall be released for delivery from any warehouse located within the state, except upon a permit having first been obtained as provided by this chapter. Applications for such permits may be filed at the office of the liquor authority in New York, Albany or Buffalo, whichever is nearest to the location of the warehouse, and shall be upon a form to be prepared by the liquor authority. This provision shall not apply to alcoholic beverages, which are to be released for shipment outside of the state.

7. Each person owning or operating any warehouse located within the state shall keep and maintain as part of his permanent records, treasury department forms fifty-two and fifty-two-a as heretofore required by the United States government.

NEW YORK CONSOLIDATED LAW SERVICE

ALCOHOLIC BEVERAGE CONTROL LAW
ARTICLE 1. SHORT TITLE; POLICY OF STATE AND PURPOSE OF CHAPTER; DEFINITIONS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

NY CLS Al Bev § 3 (2003)

§ 3. Definitions

Whenever used in this chapter, unless the context requires otherwise:

12-a. "Farm winery" means and includes any place or premises, located on a farm in New York state, in which wine is manufactured and sold.

NEW YORK CONSOLIDATED LAW SERVICE

ALCOHOLIC BEVERAGE CONTROL LAW
ARTICLE 6. SPECIAL PROVISIONS RELATING TO WINE

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

NY CLS AI Bev § 76 (2003)

§ 76. Winery license

1. Any person may apply to the liquor authority for a winery license as provided for in this article. Such application shall be in writing and verified and shall contain such information as the liquor authority shall require. Such application shall be accompanied by a [fig 1] check or draft [fig 2] for the amount required by this article for such license. If the liquor authority shall grant the application

it shall issue a license in such form as shall be determined by its rules.

2. (a) Any person having applied for and received a license as a winery or farm winery under this section or section seventy-six-a of this [fig 1] article may conduct wine tastings of New York state labelled [sic] wines in establishments licensed under section sixty-three of this chapter to sell alcoholic beverages for off premises consumption. Such winery or farm winery may charge a fee [fig 2] for each wine sample tasted. The state liquor authority shall promulgate rules and regulations regarding such tastings as provided for in this subdivision.

(a-1) (Added, L 1997) Any person having applied for and received a license as a winery or farm winery under this section or section seventy-six-a of this article may conduct wine tastings of New York state labelled [sic] wines and apply to the liquor authority for a permit to sell wine produced by such winery or farm winery, by the bottle, during such tastings in establishments licensed under section sixty-four of this chapter to sell alcoholic beverages for consumption on the premises. Such winery or farm winery may charge a fee of no more than twenty-five cents for each wine sample tasted. The state liquor authority shall promulgate rules and regulations regarding such tastings as provided for in this subdivision.

(b) Tastings shall be conducted subject to the following limitations:

(i) wine tastings shall be conducted by an official agent, representative or solicitor of one or more wineries or farm wineries. Such agent, representative or solicitor shall be physically present at all times during the conduct of the tastings; and

(ii) any liability stemming from a right of action resulting from a wine tasting as authorized herein and in accordance with the provisions of sections 11-100 and 11-101 of the general obligations law, shall accrue to the farm winery or winery licensee.

3. A licensed winery may apply to the liquor authority for a license to sell wine at retail for consumption on the premises [fig 1]. All the provisions of this chapter relative to licenses to sell wine at retail for consumption on the premises shall apply so far as applicable to such application.

3-a. (Added, L 2003) Notwithstanding any other provision of law, any winery, licensed pursuant to subdivision three of this section to sell wine at retail for consumption on the premises in a restaurant in or adjacent to the winery, may apply to the liquor authority for a license to sell beer, wine or liquor at retail for consumption on the premises of such restaurant. All of the provisions of this chapter relative to licenses to sell beer, wine or liquor at retail for consumption on the premises shall apply so far as applicable to such application.

4. [Expires and repealed Oct 15, 2008] Notwithstanding any provision of this chapter to the contrary, any one or more winery licensees or farm winery licensees, singly or jointly, may apply to the liquor authority for a license or licenses to sell wine at retail for consumption off the premises. The duration of such license shall be coextensive with the duration of such licensee's winery license or farm winery license, and the fee therefor shall be five hundred dollars if such retail premises is located in cities having a population of one million or more; in cities having less than one million population and more than one hundred thousand, two hundred fifty dollars; and elsewhere, the

sum of one hundred twenty-five dollars. Such license shall entitle the holder thereof to sell at retail for consumption off the premises any New York state labelled [sic] wine. Such license shall also entitle the holder thereof to conduct [fig 1] wine tastings and engage in any of the activities authorized by paragraphs (a), (b) and (c) of subdivision four of section seventy-seven of this article on such licensed premises. Such license shall also authorize the sale by the holder thereof of New York state labelled [sic] wine, in sealed containers for off-premises consumption, from the specially licensed premises of any person licensed pursuant to section eighty-one-a of this article to sell wine at retail for consumption on premises in which the principal business is the operation of a legitimate theater or such other lawful adult entertainment or recreational facility as the liquor authority may classify for eligibility pursuant to subdivision six of section sixty-four-a of this chapter. Not more than five such licenses shall be issued to any licensed winery or farm winery. All other provisions of this chapter relative to licenses to sell wine at retail for consumption off the premises at the winery shall apply so far as applicable to such application. The liquor authority is hereby authorized to adopt such rules as it may deem necessary to carry out the purpose of this subdivision, provided that all licenses issued pursuant to this subdivision shall be subject to the same rules and regulations as are applicable to the sale of wine at retail for consumption off the premises of the winery licensee or farm winery licensee.

5.*

* There are two subdivisions 5.

Notwithstanding any provision of this chapter to the contrary, a licensed winery or a licensed farm winery may

apply to the liquor authority for a permit to sell New York state labelled [sic] wine, by the bottle, at the state fair, at recognized county fairs and at farmers markets operated on a not-for-profit basis. As a condition of the permit, [fig 1] an agent, representative, or solicitor from the winery must be present at the time of sale.

5. *

* There are two subdivisions 5.

Any winery licensed pursuant to this section is authorized to engage in what is commonly known as wine by wire services whereby a winery within the state may make deliveries on behalf of other wineries within the state.

NEW YORK CONSOLIDATED LAW SERVICE

ALCOHOLIC BEVERAGE CONTROL LAW
ARTICLE 6. SPECIAL PROVISIONS
RELATING TO WINE

**GO TO CODE ARCHIVE DIRECTORY
FOR THIS JURISDICTION**

NY CLS Al Bev § 76-a (2003)

§ 76-a. Farm winery license

1. Any person may apply to the liquor authority for a farm winery license as provided for in this article. Such application shall be in writing and verified and shall contain such information as the liquor authority shall require. Such application shall be accompanied by a [fig 1] check or draft [fig 2] for the amount required by this article for such license. If the liquor authority shall grant the application it shall issue a license in such form as shall be determined by its rules.

2. [Repealed]

3. A farm winery license shall authorize the holder thereof to operate a farm winery for the manufacture of wine at the premises specifically designated in the license. Such a license shall also authorize the sale in bulk by such licensee from the licensed premises of the products manufactured under such license to any winery licensee, any other farm winery licensee, any distiller licensee or to a permittee engaged in the manufacture of products which are unfit for beverage use and to sell or deliver such wine to persons outside the state pursuant to the laws of the place of such sale or delivery. It shall also authorize the holder thereof to sell from the licensed premises to a licensed wholesaler or retailer, or to a corporation operating railroad cars or aircraft for consumption on such carriers, or at retail for consumption off the premises, wine manufactured by the licensee as above set forth and to sell or deliver such wine to persons outside the state pursuant to the laws of the place of such sale or delivery. All wine sold by such licensee for consumption off the premises shall be securely sealed and have attached thereto a label setting forth such information as shall be required by this chapter. Such license shall also be deemed to include authorization to sell cider and wine at retail for consumption on or off the premises; and to sell wine at retail for consumption on the premises of a restaurant, conference center, inn, bed and breakfast or hotel business owned and operated by the licensee in or adjacent to the farm winery for which the licensee is licensed. A licensee who operates a restaurant, conference center, inn, bed and breakfast or hotel pursuant to such authority shall comply with all applicable provisions of this chapter which relate

to licenses to sell wine at retail for consumption on the premises.

4. (a) A far. winery license shall authorize the holder thereof to manufacture, bottle and sell fruit juice, fruit jellies and fruit preserves, tonics and unpotable wine cooking sauces on and from the licensed premises.

(b) Such license shall authorize the holder thereof to store and sell gift items in a tax-paid room upon the licensed premises. These gift items shall be limited to the following categories:

(1) Wine supplies, which shall include any item utilized for the storage, serving or consumption of wine. These supplies may be sold as single items or may be combined into a package sold as a unit item or may be combined into a package containing wine or a wine product;

(2) Food items, which shall include any food or food product not specifically prepared for immediate consumption upon the premises. Such food items may be combined into a package containing wine or a wine product;

(3) Souvenirs, which shall include any item which can be construed to represent or serve as a memento of the licensed premises or of the state of New York.

(4) (Added, L 1993) New York state labelled [sic] wine produced or manufactured by any other New York state winery or farm winery licensee. Such wine may be purchased outright by the licensee from a New York winery or farm winery licensee or obtained on a consignment basis pursuant to a written agreement between the selling and purchasing licensee.

(c) The authority is hereby authorized to promulgate rules and regulations to effectuate the purposes of this subdivision.

(d) A licensed farm winery may engage in any other business on the licensed premises subject to such rules and regulations as the liquor authority may prescribe. In prescribing such rules and regulations, the liquor authority shall promote the expansion and profitability of wine production and of tourism in New York, thereby promoting the conservation, production and enhancement of New York state agricultural lands. Further, such rules and regulations [fig 1] shall determine which businesses will be compatible with the policy and purposes of this chapter and shall consider the effect of particular businesses on the community and area in the vicinity of the farm winery licensee.

5. No licensed farm winery shall manufacture or sell any wine not produced exclusively from grapes or other fruits or agricultural products grown or produced in New York state.

6. (Added, L 1993) Notwithstanding any other provision of this chapter, a farm winery license shall authorize the holder thereof to:

(a) Offer for sale or solicit any order in the state for the sale of any New York state labelled [sic] wine manufactured by the licensee or any other winery or farm winery licensed pursuant to this article.

(b) Engage as a broker in the purchase and sale of New York state labelled [sic] wines for a fee or commission for or on behalf of any winery or farm winery licensed pursuant to this article.

(c) Maintain a warehouse on the premises pursuant to section ninety-six of this chapter for the warehousing of any New York state labelled [sic] wines manufactured by any winery or farm winery licensed pursuant to this article. Any winery or farm winery that maintains such a warehouse must comply with the provisions of section ninety-six of this chapter.

(d) Deliver or transport any New York state labelled [sic] wine manufactured or produced by the licensee or any other winery or farm winery licensed pursuant to this article in any vehicle owned, leased or hired by the licensee. The New York state labelled [sic] wine can be delivered, transported or sold by the licensee to any holder of: (i) a winery or farm winery license, (ii) a license to sell alcoholic beverages for consumption on the premises, (iii) a license to sell alcoholic beverages for consumption off the premises, (iv) or any person that can receive or purchase wine from a farm winery. The licensee is not required to obtain from the liquor authority a trucking permit or pay any fees pursuant to section ninety-four of this chapter.

7. No licensed farm winery shall manufacture in excess of one hundred fifty thousand finished gallons of wine annually.

NEW YORK CONSOLIDATED LAW SERVICE

ALCOHOLIC BEVERAGE CONTROL LAW
ARTICLE 7. SPECIAL PERMITS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

NY CLS Al Bev § 99-b (2003)

§ 99-b. Miscellaneous permits

1. The liquor authority is hereby authorized to issue a permit to:

a. A sheriff, marshal, assignee for the benefit of creditors, trustee or receiver in bankruptcy, executor or administrator of an estate, to sell the stock of alcoholic beverages which came into his possession pursuant to judicial process.

b. A steamship company or company operating aircraft, or its duly authorized agent, to purchase from a manufacturer or wholesaler in this state alcoholic beverages for ship's stores for consumption outside the territorial jurisdiction of the state, and not for purposes of resale in this state.

c. A person engaged in the manufacture of products which are unfit for beverage use and classified by the United States treasury department, as exempt from special and commodity taxes to purchase liquor, wine or beer from licensed wholesalers and manufacturers for use only in the process of manufacture of such products.

d. A fire insurance company or fire salvage company, under the supervision of the New York state department of insurance, to sell to licensees alcoholic beverages which came into its possession as a result of a fire on licensed premises.

e. A hospital, which shall mean a place for overnight care of the sick, conducted or licensed by the state or a political subdivision thereof or subject to visitation and inspection by the state board of social welfare to purchase liquor, wine or beer for medicinal use only in the treatment of bona fide patients of such hospital.

f. A licensee who is liquidating or selling his business, or a former licensee whose license was surrendered or expired, to sell his entire stock of alcoholic beverages to other licensees.

g. A warehouseman, railroad company, steamship company, or other person who has acquired a lien pursuant to law for the storage or carriage of alcoholic beverages, to sell such alcoholic beverages to a licensee.

h. [Repealed]

i. A bank or trust company incorporated under articles three, seven or twelve of the banking law or a foreign banking corporation licensed by superintendent of insurance of this state or a banking corporation organized under the laws of the United States and doing business in this state, to sell warehouse receipts pertaining to alcoholic beverages which it has accepted as collateral security for a loan to a licensee and which it acquired through default in the payment of such loan.

j. A person duly licensed outside the state of New York to manufacture or sell alcoholic beverages at wholesale, or his duly authorized representative, to negotiate and consummate contracts or agreements with licensed wholesalers in this state for the establishment of operating agency relationships for the sale of its products in this state.

k. A person to purchase, receive or sell alcoholic beverages or receipts, certificates, contracts or other documents pertaining to alcoholic beverages, in cases not expressly provided for by this chapter, when in the judgment of the liquor authority it would be appropriate and consistent with the purpose of this chapter.

l. (1) Licensed wineries and licensed farm wineries to sell New York state labelled [sic] wine, by the bottle, at the state fair, at recognized county fairs and at farmers markets operated on a not-for-profit basis.

(2) The permit shall be valid for the length of the event, but not for a period to exceed one year.

(3) No fee shall be charged for permits issued pursuant to this subdivision.

2. Each such permit and the exercise of the privilege granted thereby may be subjected to such rules and conditions by the liquor authority as it deems necessary.

3. Each such permit shall be issued in such form as shall be prescribed by the liquor authority and shall be valid for one transaction only, except that a permit issued pursuant to [fig 1] paragraph b, c, e, or j of subdivision one of this section may be issued either for one transaction or for a calendar year. The liquor authority may, by rule, fix the quantity of alcoholic beverages to be involved in a single transaction under a permit issued pursuant to [fig 2] paragraph k of subdivision one of this section, but no single transaction so authorized shall involve more than twenty cases of alcoholic beverages. The fee for each such permit shall be fixed by the liquor authority, but shall not exceed [fig 3] ninety dollars for a permit valid for one

transaction only nor two hundred fifty-six dollars for a permit issued for a calendar year.

NEW YORK CONSOLIDATED LAW SERVICE

ALCOHOLIC BEVERAGE CONTROL LAW
ARTICLE 8. GENERAL PROVISIONS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

NY CLS Al Bev §105 (2003)

§ 105. Provisions governing licensees to sell at retail for consumption off the premises

9. No retail licensee for off-premises consumption shall deliver any liquors or wines except in vehicles owned and operated by such licensee, or hired and operated by such licensee from a trucking or transportation company registered with the liquor authority, and shall only make such deliveries at the premises of the purchaser.

NEW YORK CONSOLIDATED LAW SERVICE

ALCOHOLIC BEVERAGE CONTROL LAW
ARTICLE 8. GENERAL PROVISIONS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

NY CLS Al Bev § 130 (2003)

§ 130. Penalties for violation of chapter

1. Any person who manufactures for sale or sells alcoholic beverages, other than the illicit alcoholic beverages as defined in section one hundred fifty, without

having an appropriate license therefor, or whose license has been revoked, surrendered or cancelled, shall be guilty of a misdemeanor, and upon first conviction thereof shall be punished by a fine not more than two times the cost of a special on premises license in the county where the unlawful act took place or by imprisonment in a county jail or penitentiary for a term of not less than thirty days nor more than one year or both and upon second conviction thereof shall be punished by a fine not less than two times and not more than three times the cost of a special on premises license in the county where the unlawful act took place or by imprisonment in a county jail or penitentiary for a term of not less than thirty days nor more than one year or both and upon all subsequent convictions thereof shall be punished by a fine not less than three times and not more than four times the cost of a special on premises license in the county where the unlawful act took place or by imprisonment in a county jail or penitentiary for a term of not less than thirty days nor more than one year or both provided, however, that in default of payment of any fine imposed, such person shall be imprisoned in a county jail or penitentiary for a term of not less than thirty days.

1-a. Any licensee, whose license has been suspended pursuant to the provisions of this chapter, who sells alcoholic beverages during the suspension period, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than two hundred dollars or by imprisonment in a county jail or penitentiary for a term of not more than six months, or by both such fine and imprisonment.

2. Any person who shall make any false statement in the application for a license or a permit under this chapter shall be guilty of a misdemeanor, and upon conviction

thereof shall be punishable by a fine of not more than two hundred dollars, or by imprisonment in a county jail or penitentiary for a term of not more than six months or both.

3. Any violation by any person of any provision of this chapter for which no punishment or penalty is otherwise provided shall be a misdemeanor, provided, however, that the provisions of this subdivision shall not apply to the prohibitions provided for in subdivision six-a of section one hundred six of this chapter.

4. In the city of New York, a summons shall be issued for a violation of the provisions of subdivision fourteen of section one hundred and five, section one hundred and five-a and subdivision five of section one hundred and six of this chapter in the same manner as provided by subdivision h of section one hundred and sixteen of the New York city [sic] criminal courts act.

5. Any violation by any person of the alcoholic beverage control law for which no punishment or penalty is otherwise provided shall be a misdemeanor, provided, however, that the provisions of this subdivision shall not apply to the prohibitions provided for in subdivision six-a of section one hundred six of this chapter.

NEW YORK CONSOLIDATED LAW SERVICE

PENAL LAW
PART ONE. GENERAL PROVISIONS
TITLE A. GENERAL PURPOSES,
RULES OF CONSTRUCTION, AND DEFINITIONS
ARTICLE 10. DEFINITIONS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

NY CLS Penal § 10.00 (2004)

§ 10.00. Definitions of terms of general use in this chapter

Except where different meanings are expressly specified in subsequent provisions of this chapter, the following terms have the following meanings:

4. "Misdemeanor" means an offense, other than a "traffic infraction," for which a sentence to a term of imprisonment in excess of fifteen days may be imposed, but for which a sentence to a term of imprisonment in excess of one year cannot be imposed.